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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a Court of Appeals fulfill its statutory obligation to "compel agency action * * * unreasonably delayed" by finding that an agency's twenty-one-year delay in carrying out a congressional mandate for expeditious agency action is reasonable, and by taking the agency at its "word" that the agency will eventually comply with its mandate at some unspecified time in the future?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Grand Canyon Trust, National Parks and Conservation Association, Sierra Club, The Wilderness Society, Friends of the Grand Canyon, Grand Canyon River Guides and Northern Arizona Audubon Society were petitioners in the Court of Appeals. Pursuant to S. Ct. Rule 29.6, petitioners state that they have no parent corporations and no nonwholly owned subsidiaries.

Respondent Federal Aviation Administration was respondent in the Court of Appeals. Grand Canyon Air Tour Coalition, Hualapai Indian Tribe, Clark County Department of Aviation, and the Las Vegas Convention and Visitors Authority, petitioners in the consolidated case before the Court of Appeals, are also respondents pursuant to S. Ct. Rule 12.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Grand Canyon Trust, National Parks and Conservation Association, Sierra Club, The Wilderness Society, Friends of the Grand Canyon, Grand Canyon River Guides, and Northern Arizona Audubon Society (collectively, the "Trust") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals denying the petition for review is reported at 154 F.3d 455 and is reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1998. That court entered orders denying rehearing and rehearing *in banc* on November 4, 1998. App. 41a, 42a. On January 22, 1999, Chief Justice Rehnquist granted petitioners' application to extend the time for filing this petition to and including March 4, 1999. App. 44a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The National Parks Overflights Act ("Overflights Act"), Pub. L. No. 100-91, 101 Stat. 676 (1987) (codified at 16 U.S.C. § 1a-1 note), and Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, are reprinted at App. 45a-47a.

STATEMENT OF THE CASE

Congress passed a law in 1987 requiring the FAA and the National Park Service to expeditiously restore "natural quiet" to Grand Canyon National Park. Twelve years later, the agencies still have not accomplished that mandate, and they do not plan to do so until 2008. The Court of Appeals, which is required to compel agency action "unreasonably delayed," concluded that the agency's twenty-one-year delay in this case was not unreasonable. It also took the agency at its "word" that the agency would comply with its congressional mandate in some unspecified way, at some time in the future. Thus, in one decision, the Court of Appeals virtually foreclosed judicial review of agency delay, and virtually guaranteed that agencies forced to answer a charge of unreasonable delay will be able to fend off judicial intervention just by promising to do something in the future.

This is not the way the APA should work. Under Section 706(1), the Court of Appeals had not only the "authority," but the mandatory obligation, to take a hard look at the agency's actions over the years since the passage of the Overflights Act and at its plans to implement its mandate going forward. The court shirked that obligation.

A. Background

The Grand Canyon of the Colorado River is one of the seven natural wonders of the world.[1] Two hundred and seventy-seven miles long, a vertical mile deep, varying in width from five to eighteen miles across, and with a geological history dating back two billion years, the Grand Canyon occupies a singular place in our Nation's heritage and history.[2] Over a century after John Wesley Powell's first expedition through the Canyon on the Colorado River, millions of people a year now come to the Canyon to experience its staggeringly beautiful vistas, to hike its demanding trails, to travel by raft down its river gorge, and to camp in its pristine backcountry.

The heavy visitor traffic places equally heavy demands on the Canyon. To preserve the Canyon's delicate ecosystem, various restrictions are imposed on the activities of those visiting the Canyon, including strict limits on the number of permits available for backcountry camping and use of the Colorado River. The Canyon's air quality has also been the subject of legislation and litigation. *See Central Arizona Water Conservation Dist.* v. *EPA*, 990 F.2d 1531 (9th Cir.), *cert. denied*, 510 U.S. 828 (1993). And in recent decades, the ever-increasing volume of air traffic over the Canyon, and the noise that this traffic produces, has caused mounting concern.

In 1987, air tour companies conducted more than 50,000 overflights over Grand Canyon National Park. United States Dep't of Interior, Report on Effects of Aircraft Overflights on the National Park System at 41 (1994) (hereinafter "Park

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[1] Reg Cox, *Seven Natural Wonders of the World* (Silver Burdett Press, 1996).

[2] *See also Cameron* v. *United States*, 252 U.S. 450, 455-456 (1920) ("The Grand Canyon * * * is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.").

Service Report"). By 1996, that number had increased to almost 100,000 overflights; put another way, an average of 273 aircraft flew over the Grand Canyon every day in 1996. *See* 61 Fed. Reg. 69304 (Dec. 31, 1996).[3] A 1992 National Park Service survey of visitors to three Grand Canyon sites showed approximately 22, 24, and 31 overflights an hour over the sites—or approximately one overflight every two to three minutes. Park Service Report at 144. The near-constant overflights not only posed a grave safety problem,[4] but also seriously interfered with visitors' enjoyment of the Park and its surroundings. *See, e.g., id.* at 145.

To address the problem of aircraft noise over the Grand Canyon, on August 18, 1987, Congress enacted the National Parks Overflights Act, 16 U.S.C. § 1a-1 note. [5] Section 3 of the Act stated that

> [n]oise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users.

Overflights Act § 3(a). Congress required the Secretary of the Interior to address the "significant adverse effect" of aircraft overflights on the Park's natural quiet by submitting

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[3] *See also* 59 Fed. Reg. 12742 (1994) (noting that during summer months, air tours over the Grand Canyon exceeded 10,000 a month).

[4] *See* Park Service Report at 42 (discussing fatal June 1986 collision between two tour aircraft over Grand Canyon).

[5] In enacting the Overflights Act, legislators expressed their frustration with "the administration's reluctance or inability to act" to resolve the growing problem of aircraft noise over Grand Canyon National Park. *See, e.g.,* 133 Cong. Rec. S 10800 (1987) (remarks of Sen. Matsunaga). The statute thus evinced Congress' understanding that prior agency actions "[did] not adequately address the adverse effects caused by low flying aircraft." S. Rep. No. 100-95, at 8 (1987).

to the Federal Aviation Administration, within thirty days after enactment of the Overflights Act, "recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." *Id.* § 3(b)(1). Congress further required that the recommendations "provide for substantial restoration of the natural quiet and experience of the park and protection of public health and safety" from the adverse effects of aircraft overflights. *Id.*

The Overflights Act also ordered that "[n]ot later than 90 days after receipt of [the recommendations of the Secretary of the Interior] and after notice and opportunity for a hearing," the FAA Administrator was to "prepare and issue a *final plan* for the management of air traffic in the air space above the Grand Canyon." *Id.* § 3(b)(2) (emphasis added). The "final plan" was to implement the Secretary's recommendations "without change," unless the Administrator concluded that implementing the recommendations would "adversely affect aviation safety." *Id.*[6] Finally, the Overflights Act ordered the Secretary of the Interior to submit a report to Congress within two years of the Act's passage discussing "whether the plan has succeeded in substantially restoring the natural quiet in the park," and "such other matters, including possible revisions in the plan, as may be of interest." *Id.* § 3(b)(3). The Act's three requirements signaled Congress' intent that "natural quiet" be "substantial[ly]" restored to the Grand Canyon, at the latest, within two years and four months after enactment of the Act: four months for promulgation of regulations and two years for the regulations to "succeed[ ]" in their goal.

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[6] If the Administrator determined that the Secretary's recommendations *would* "adversely affect aviation safety," the Overflights Act required him to issue regulations implementing revised recommendations within 60 days of making that determination. Overflights Act § 3(b)(2).

B. Agency Proceedings

Unfortunately, however, the agencies charged with carrying out Congress' mandate did not remotely meet their statutory obligations, and to this day have no plans for doing so. The National Park Service, to which the Secretary of the Interior had delegated his authority, submitted its recommendations to the FAA in December 1987, three months after the congressional deadline for it to do so. Six months later, in June 1988, the FAA issued a rule known as SFAR 50-2. *See* 53 Fed. Reg. 20264 (1988). That regulation established flight-free zones over less than half the park. It was to expire four years later, in June 1992, but was twice extended by the FAA. *See* 57 Fed. Reg. 26764 (1992) (extending regulations to June 15, 1995); 60 Fed. Reg. 31608 (extending regulations to June 15, 1997).

On September 12, 1994—over four years late, and over seven years after the passage of the Overflights Act—the National Park Service released the report the Act required, addressing "whether the plan has succeeded in substantially restoring the natural quiet in the park." Overflights Act § 3(b)(3). The Park Service Report concluded that "natural quiet is not yet substantially restored" to the Park, Ct. App. J.A. 136, even under the Park Service's generous definition of that standard. *See id.* 136-39.[7] The Report further advised that, absent revisions to the regulations, the portions of the Park experiencing natural quiet would *drop* to less than 10 percent by the year 2010. *Id.* at 95. The Park Service was thus "compelled to strongly recommend" that the overflight regulations be "revised to effect *and maintain* a substantial restoration of natural quiet." *Id.* (emphasis in original).

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[7] The Park Service's Report defined "substantial restoration of natural quiet" to mean that 50 percent of Grand Canyon National Park was free from tour flight noise for at least 75 percent of the day. *See* Ct. App. J.A. 123. The Trust took issue with that definition before the Court of Appeals, arguing that bringing quiet to just half the Park for seventy-five percent of the day was far from a "substantial" restoration of natural quiet. The Court of Appeals rejected the Trust's argument. App. 32a.

In anticipation of the Park Service report, the FAA and the Park Service jointly published an Advance Notice of Proposed Rulemaking, in which both agencies recognized that the Park's natural quiet had steadily worsened during the seven years following passage of the Overflights Act. 59 Fed. Reg. 12740, 12741 (1994). As the FAA acknowledged, between 1988 and 1995, the proportion of the Park experiencing the requisite "substantial restoration" of natural quiet had *declined* to about 30%, 61 Fed. Reg. at 69317, as the number of annual tourist flights grew from 40,000 to over 100,000.

Yet the FAA still failed to act. As the Court of Appeals would later observe, while the agency received hundreds of comments pertaining to the Grand Canyon alone, "two years later [it] still had not proposed regulations" to carry out Congress' directions, "let alone finalized any." App. 7a. In April 1996—approaching ten years after passage of the Overflights Act, and with the congressional mandate of "substantial restoration of natural quiet" admittedly nowhere in sight—the President ordered the Department of Transportation to "reduce the noise [in the Park] *immediately*," by "issu[ing] proposed regulations within 90 days." Ct. App. J.A. 90 (emphasis added). The President further required that "[a]ction on this rulemaking to accomplish these purposes should be completed by the end of 1996." *Id.*

In July 1996, the FAA at long last published the notice of proposed rulemaking intended "to reduce the impact of aircraft noise on the park environment." 61 Fed. Reg. 40120 (1996). Significantly, however, the agency did *not* claim that its proposed rule would achieve the substantial restoration Congress had intended be accomplished by December 1997. It claimed only that the proposed rule would make "progress" toward that mandate. *Id.* at 40123.

The FAA's reasons for failing to restore natural quiet as expeditiously as Congress ordered were revealed in its proposed rule, and they had nothing to do with aviation *safety*—the only issue the Administrator could consider in

implementing the Secretary's recommendations. *See* Overflights Act § 3(b)(2) ("The plan shall, by appropriate regulation, implement the recommendations of the Secretary *without change* unless the Administrator determines that implementing the recommendations would adversely affect aviation safety.") (emphasis added). Instead, although FAA acknowledged that the Park Service had previously submitted a plan that would "essentially restore quiet," the agencies nevertheless spent "months" considering "modifications" to "*preserve the viability of the commercial sightseeing industry* serving GCNP." 61 Fed. Reg. at 40134 (emphasis added).

On December 31, 1996, the FAA published the Final Rule that was challenged below. The rule redefined the air space over the Park, established flight-free zones, flight corridors and air tour routes, and established a curfew in specified corridors and a cap on the number of tourist aircraft—though not on the number of aircraft *flights*. 61 Fed. Reg. 69302. Along with this Final Rule, the FAA issued two accompanying notices of proposed rulemaking, one proposing a 12-year plan to convert to higher-capacity aircraft that produce about the same or less noise per passenger, 61 Fed Reg. at 69339, and the other proposing changes to the commercial air tour routes at the Park. *Id.* at 69356. The agency stated that its Final Rule, in conjunction with the two proposed rules that have still never been issued, would bring substantial restoration of natural quiet to the Park by the year 2008—fully 21 years after Congress passed the Overflights Act. Ct. App. J.A. 180.

In February 1997, FAA stayed the effective dates of portions of the Final Rule through January 31, 1998, *see* 62 Fed. Reg. 8862 (1997), and then extended the effective date again, to January 31, 1999. 62 Fed. Reg. 66248 (1997). While the curfew and cap provisions of the regulations were in force, the restrictions on flight-free zones, flight corridors and air tour routes were stayed.

By October 1997, the agency recognized that it had "significantly underestimated" the number of aircraft operating in the Park. App. 10a. Indeed, the number of

aircraft operating in the Park was close to double the agency's original estimate. *See* 62 Fed. Reg. 58,898, 58,900 (1997). The agency, however, did not view its error as requiring revisions to the Final Rule. Instead, the agency noted that the Rule would just be "less effective" than it had initially projected, achieving "substantial restoration of the natural quiet in only 41.7 % of the Park in 1997, decreasing to 34.2% in 2008." App. 11a; 62 Fed. Reg. 58,900.[8] Thus, to this day the FAA has not adopted regulations that will ever bring "substantial restoration of natural quiet" to the Grand Canyon, as Congress mandated over a decade ago, and it has no concrete plans for doing so.

C. The Petition For Review

Following the issuance of the 1996 Rule, the Trust filed a petition for review in the Court of Appeals. The Trust argued, *inter alia*, that the agency's decades-long delay in restoring natural quiet to the Canyon flouted Congress' express mandate and was patently unreasonable.[9] The Trust requested that the Court of Appeals, pursuant to its obligation under the APA to "compel agency action * * * unreasonably delayed," 5 U.S.C. § 706(1), declare that the FAA's action had indeed been unreasonably delayed and require the agencies to issue regulations in a timely manner that would promptly accomplish Congress' long-delayed mandate. Trust Br. 17-18.

The FAA had no substantive response to the Trust's argument that the agency had violated its congressionally-mandated duty to issue regulations restoring natural quiet to the Grand Canyon. It argued only that the Trust had waited

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[8] Of course, neither scenario would result in the 50% restoration of natural quiet required by the Overflights Act.

[9] Several other entities—the Grand Canyon Air Tour Coalition, Hualapai Indian Tribe, Clark County Department of Aviation, and the Las Vegas Convention and Visitors Authority—also filed petitions for review raising various challenges to the scope and nature of the Rule. The Court of Appeals rejected all of the petitions. App. 12a-30a.

too long to challenge the agency's foot-dragging, which the agency described as "incremental steps." Respondents' Br. 3. The agency did not dispute that it had failed, ten years after enactment of the governing statute, to issue regulations that even the agency contended would accomplish Congress' direction. Instead, it argued to the court that "[t]he administrative process is working, and the FAA and the Secretary have combined to produce a plan that will, *when fully implemented*, provide for the substantial restoration of natural quiet in the Park." *Id.* at 30 (emphasis added).

D. The Court of Appeals' Decision

The Court of Appeals denied the Trust's petition for review. App. 30a-40a. It acknowledged at the outset that the language of the Overflights Act "*manifest[ed] a congressional concern with expeditious agency action*," and observed as well that the agencies charged with taking "expeditious * * * action" had been habitually late, sometimes years late, in complying with the mandates of the Overflights Act. App. 36a (emphasis added). The Court nonetheless declared itself "acutely aware of the limits of [its] institutional competence in this case," and rejected the Trust's request that it order the FAA to accomplish what Congress told it to do in 1987. App. 35a.

The Court of Appeals recognized some "force" to the Trust's argument that "it was unreasonable for the FAA to wait ten years to issue a regulation requiring substantial restoration, and then to issue one that permits another ten years to pass before substantial restoration is achieved." App. 37a. It concluded, however, that while the agency was "tardy," it was "unfair to characterize it as doing nothing during those first ten years," because the FAA had issued SFAR 50-2, a regulation which went "part of the way" toward restoration of quiet in the Canyon. *Id.* The court also concluded that this is not a case where the agency had been "contumacious in ignoring court directions to expedite decision-making." *Id.* at 38. The court further observed that while the agency was "undeniably slow" in proposing the

current rule, "this is the first time any party has challenged the agency's delay in court." *Id.* at 37.[10]

Ignoring the fact that (as it recognized elsewhere) the agency had waited ten years before even *implementing* the Final Rule, the Court of Appeals next concluded that "issuing a rule that does not contemplate final achievement of Congress' goal for ten years" was not unreasonable. App. 38a.

Finally, the Court of Appeals dismissed the Trust's contention that the Final Rule and the proposed complementary regulations would *still* not accomplish what Congress ordered the FAA to do, as the agency itself conceded. *See* App. 11a (noting FAA's revised estimate of only 34.2% of the Park experiencing substantial restoration of natural quiet by 2008). Citing to the transcript of oral argument before the panel—at which counsel for the FAA represented that future regulations (which the agency *still* has not adopted) would somehow "make up the gap" between the FAA's current estimates and the statutory mandate—the court simply concluded that it would "take the government at its word" that by 2008, more than twenty years after passage of the Overflights Act, the FAA would attain what Congress had intended be implemented by December 1987. App. 39a. The Court nowhere explained how such delayed action could be squared with the timetable set by Congress or with Congress' clear mandate for "expeditious agency action." App. 36a.

The Court of Appeals denied the Trust's petition for rehearing and suggestion for rehearing *en banc*. App. 41a, 42a. On January 22, 1999, Chief Justice Rehnquist entered an order extending the time within which to file this petition to and including March 4, 1999. App. 44a.

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[10] Petitioners, of course, could not have challenged the Final Rule any earlier than they did, because the rule was not promulgated until nearly a decade after the enactment of the Overflights Act.

REASONS FOR GRANTING THE WRIT

The Court of Appeals abdicated its duty under the Administrative Procedure Act to "compel agency action * * * unreasonably delayed" when it concluded that a twenty-one-year delay in fulfilling a congressional mandate requiring expeditious agency action was reasonable, and when it "t[ook] the government at its word" that it would eventually comply with its statutory mandate to restore natural quiet to the Grand Canyon. App. 39a. This abdication has not only flouted congressional will regarding a national treasure of enormous importance to millions of Americans; it has also called seriously into question the commitment of the Court of Appeals to correct inappropriate agency action in general. This Court should grant certiorari in this case to clarify this important area of the law and remind the courts of appeal of their obligation under the Administrative Procedure Act to ensure that agencies timely comply with their congressional mandates.

I. THE COURT OF APPEALS DEFIED THE PLAIN LANGUAGE OF THE APA

1. The Administrative Procedure Act requires an agency to "conclude a matter presented to it" within a "reasonable time." 5 U.S.C. § 555(b). In furtherance of this requirement, the APA provides that reviewing courts "shall compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). *See Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980); *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561, 590 (1989) (Scalia, J., concurring) (APA "instructs reviewing courts to 'compel agency action unlawfully withheld or unreasonably delayed' ").

The Tenth Circuit recently described its obligation under Section 706(1) thus:

> "Shall" means shall. The Supreme Court * * * ha[s] made clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. * * * Through § 706 Congress has

> stated unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed.

Forest Guardians v. *Babbitt*, 164 F.3d 1268-69 (10th Cir. 1998) (emphasis added). *See also Estate of French* v. *FERC*, 603 F.2d 1158, 1167 (5th Cir. 1979) (noting reviewing courts' "duty" to compel agency action unreasonably delayed). Yet here, the Court of Appeals described Section 706(1) only as conferring the "authority" to compel agency action unreasonably delayed, ignoring the mandatory language in the statute. App. 35a.

Unlike a writ of mandamus issued under the All Writs Act, 28 U.S.C. § 1651, which is left to the discretion of the court and reserved for "extraordinary circumstances," *United States* v. *Martinez-Zayas*, 857 F.2d 122 (3d Cir. 1988), under the APA a reviewing court *must* compel the agency to act if the agency has unreasonably delayed such action. *Compare Northern States Power Co.* v. *Department of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (describing burden to be satisfied on petition for mandamus), *cert. denied*, 119 S. Ct. 538 (1998).

This Court's intervention is now required to ensure that the myriad agencies whose actions the D.C. Circuit continually reviews understand that they must respond to Congress' commands on a timely basis, and that the D.C. Circuit meets its statutory obligations to ensure that timeliness. In *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), the D.C. Circuit found several factors to be "useful guidance in assessing claims of agency delay":

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court

> should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" [750 F.2d at 80 (citations omitted).]

The court, however, did not apply those factors to this case, instead deciding to take the agency "at its word" that it would eventually promulgate regulations that would accomplish—*twenty-one years later*—the mandate that Congress intended to accomplish through "expeditious * * * action." App. 39a, 36a. Had it weighed its stated factors, the court would have had to conclude that the FAA's delay in implementing its congressional mandate is patently unreasonable. This is a case with a clear congressional timetable reflecting that Congress intended "expeditious" action to redress the damage to the Park's environment. Yet the agencies charged with that obligation procrastinated for more than a decade in passing regulations designed to fulfill that mandate, and they now predict they will take another decade to implement Congress' direction, through unspecified future regulations that have not even been issued. *See Cutler* v. *Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987) (inordinate agency delay "frustrate[s] congressional intent by forcing a breakdown of regulatory processes").

The agencies' interminable delay affects not merely economic regulation, but threatens the environmental quality of one of the Nation's most important landmarks and the enjoyment of its millions of visitors whose "health and safety" Congress specifically sought to protect. Overflights Act § 3(b)(1). And the FAA provided *no* evidence that "higher or competing" priorities have somehow prevented it from carrying out Congress' intent for years upon end.

Nevertheless, the Court of Appeals, in one paragraph, dismissed the Trust's argument that the twenty-one-year lag from enactment of the Overflights Act to fulfillment of its

mandate was unreasonable. Ignoring the decade-long delay in promulgating the Final Rule, the Court of Appeals tersely concluded that "issuing a rule that does not contemplate final achievement of Congress' goal for ten years" was not "inherently unreasonable." App. 38a. According to the Court of Appeals, this was because the issues involved in the rulemaking were "complex" and "complicated." *Id.*

Never before has a court of appeals condoned a delay of this length. Until now, the courts of appeal, including the D.C. Circuit, had made clear that agency delay could be condoned when it encompassed "months, occasionally a year or two, but *not* several years or a decade." *MCI Telecomms. Corp.* v. *FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (emphasis added); *see also Washington Legal Found.* v. *Alexander*, 984 F.2d 483, 488 (D.C. Cir. 1993) (same); *Community Nutrition Inst.* v. *Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986) (same). And in past cases, delays of far shorter than twenty-one years have been found unreasonable. *See Nader* v. *FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) ("no justification" for ten-year delay in agency action); *Potomac Elec. Power Co.* v. *ICC*, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983) (eight-year delay unreasonable); *Abbott Labs.* v. *Harris*, 481 F. Supp. 74, 76-77 (N.D. Ill. 1979) (six-year delay unreasonable). *See also Public Citizen Health Research Group* v. *Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (six-year delay in promulgating environmental regulation "treads at the very lip of the abyss of unreasonable delay").

This case outstrips by a full decade the worst-case scenario described in *MCI Communications*. But stating only that the case was "complicated" and "complex," the Court of Appeals abandoned without explanation its prior and more prudent approach. Under this standard, it is submitted that the APA's requirements would be rendered a dead letter. This Court should grant review to make clear that an agency will not be granted a wholesale exemption from Section 706(1) merely because a proceeding may be "complex." The Court of Appeals has made allowances for the "complexity" of agency

proceedings before—but never two decades worth of allowance. *Compare Public Citizen* v. *Brock*, 823 F.2d at 629 (allowing agency eight months to issue final rule; although court was "disappointed" in agency's target date, "complexity" of the questions involved and agency's limited resources warranted eight-month delay); *In re United Steelworkers of Am.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (14-month delay in completing final rule not "facially unreasonable," where agency was addressing "complex scientific and technical issues"). Congress knew that the issue here might be "complex," yet it chose an expeditious timetable for addressing that issue. Neither the agencies nor the Court of Appeals had any authority to depart from that timetable.

In an attempt to justify its unprecedented departure from its APA mandate, the Court of Appeals suggested that while the FAA was undeniably "tardy" in promulgating regulations to fulfill its statutory mandate, it was "unfair to characterize it as doing nothing." App. 37a. No one accused the agency of "doing nothing." The claim is that the agency unreasonably delayed doing what Congress ordered. The agency's occasional—and ineffectual—stabs at compliance with its congressional mandate do not excuse delay; at the most, the FAA's intermittent actions take the agency out of the line of cases involving an agency's refusal to act, and bring it within the line of cases involving unreasonable delay. *See* 5 U.S.C. § 706(1) (requiring court to "compel agency action unlawfully withheld"). This Court should grant review to confirm that an agency cannot avoid Section 706(1) review merely by making occasional dilatory attempts at fulfilling its congressional mandate. *See Public Citizen* v. *Brock*, 823 F.2d at 627 (court of appeals "cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law").[11]

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[11] The Court of Appeals also refused to order relief because it concluded that the FAA had not been "contumacious in ignoring court directions to expedite decision-making." App. 38a. Again this ignores the claim being made here, and constitutes an unprecedented gloss on Section 706(1). It also flatly contradicts prior holdings of the Court of Appeals that "the court need not

2. The Court of Appeals abandoned its obligation under the APA in another respect; by taking the agency at its "word" that the agency would eventually accomplish the task Congress charged it with in 1987, the court allowed the agency to dictate the limits of its judicial review.

The FAA has repeatedly acknowledged that its current rules will *not* fulfill Congress' mandate: the "substantial restoration of natural quiet" to the Canyon. *Cf. MCI Telecomms.*, 627 F.2d at 324-325 (five-year delay in determining lawfulness of telephone rates unreasonable, where agency repeatedly acknowledged that the rates were unsupported but refused to remedy). The Court of Appeals concluded, however, that although the FAA had not (and still has not) adopted regulations ensuring the substantial restoration of natural quiet even by 2008—twenty-one years after enactment of the Overflights Act—the Court would simply "take the government at its word" that the FAA would eventually promulgate regulations necessary to bring it into compliance with its congressional mandate. App. 39a.

In "tak[ing] the government at its word," the Court of Appeals shrugged off the last vestiges of its statutory obligation to review the FAA's action. As with its unprecedented suggestion that a twenty-one-year agency delay is not "unreasonable," the Court of Appeals has set a completely open-ended standard for agencies asked to explain their delays. Following the D.C. Circuit's opinion in this case, all an agency must do when questioned about a lengthy delay is to promise to take unspecified action at some unspecified point in the future—in other words, represent that the agency will get around to fulfilling its mandate eventually. Under this approach, no delay is "unreasonable," as long as it is accompanied with a wink and a promise from agency counsel.

'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.' " *TRAC*, 750 F.2d at 80 (citation omitted).

Never before has the government's mere "word" been enough in itself to satisfy a court faced with agency action that has plainly already been unreasonably delayed. In certain cases, after indicating that a delay has been unreasonable, courts will retain jurisdiction and demand reports from the agency on its progress toward completion. In *TRAC*, for example, the Court of Appeals noted that the agency had "assured us that it is moving expeditiously * * *. But in light of the Commission's failure to meet its self-declared prior deadlines for these proceedings, we believe these delays are serious enough for us to retain jurisdiction over this case until final agency disposition." 750 F.2d at 80. The court required the agency to advise the court of its progress every 60 days until completion. *See id.* at 81; *see also Public Citizen* v. *Brock*, 823 F.2d at 629 (ordering agency to submit reports to court every 90 days until final rule in place).[12]

The Court of Appeals abandoned that practice altogether in this case, a practice that would at least have permitted the court to assure itself that progress was being made. Of course, such a retention of jurisdiction (potentially until 2008) would have exposed as wholly untenable the court's determination that it is "reasonable" for an agency to delay for twenty-one years before fulfilling a congressional mandate to take expeditious action.

For these reasons, this Court's intervention is necessary to clarify the circumstances in which Section 706(1) can be employed to compel agency action that has been unreasonably delayed. Is the statute a mandatory directive to the courts, as the Tenth Circuit has recently confirmed? Or

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[12] In *Orion Communications Ltd.* v. *FCC*, 131 F.3d 176 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 62 (1998), cited by the Court of Appeals in this case as justification for "tak[ing] the government at its word," App. 39a, Congress had recently passed legislation requiring the agency to promulgate regulations to address the issue before the court in that case. The agency's "word" in that case was backed up by legislative edict, and in any event was to be resolved in a matter of months. 131 F. 3d at 182.

does the statute permit a court, as the D.C. Circuit did in this case, to excuse an agency from expeditious compliance with Congress' commands so long as the agency offers a vague promise that those commands will be carried out more than two decades later? Petitioners believe that the D.C. Circuit wholly abdicated its responsibilities under Section 706(1), and that its holding, if allowed to stand unreviewed, could have widespread implications for the hundreds of agencies subject to the APA. This Court has never considered the extent of the obligations of the courts of appeal under Section 706(1), and only this Court can provide the necessary clarification on this important issue. And, as next explained, this case presents a compelling vehicle for addressing that important issue.

II. THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE AND SHOULD BE DECIDED IN THIS CASE.

For two reasons, the Court should use this case to decide the important question presented by this petition. First, the case comes from the District of Columbia Circuit, which has the primary, often the solitary, word on the question presented. That court has exclusive jurisdiction over a large portion of petitions for review of agency actions, and courts of appeal sharing jurisdiction over other agency actions with the District of Columbia Circuit often look to it for guidance. *See Stone* v. *INS*, 514 U.S. 386, 404 (1995) (District of Columbia Circuit has "the most experience reviewing agency decisions"). In this case, the Court of Appeals bent over backwards to give wholesale deference to the agency, allowing the FAA simply to give its "word" that, two decades after Congress required it to substantially restore natural quiet to the Grand Canyon, it would get around to the task. Deference to an agency's expertise is one thing; total abdication to the agency, as in this case, is another entirely. Such an approach by the D.C. Circuit should not be upheld without review by this Court.

Second, this case is of national importance in another way—a way few other cases ever are. It involves one of our

Nation's most treasured sites, Grand Canyon National Park. It involves as well an express congressional determination that the natural quiet so vital to enjoyment of that place was jeopardized by the near-constant noise of thousands of aircraft and must be substantially restored. The agency charged with restoring that state of natural quiet has failed to accomplish that task—indeed, the percentage of the Grand Canyon experiencing natural quiet has *declined* since the passage of the Overflights Act—and the agency has no plans to fulfill its mandate until well into the next decade. It is difficult to imagine a more important case for deciding whether the Court of Appeals' interpretation of its obligations under the APA was correct. This Court should grant review and confirm that judicial review of agency action under Section 706(1) is not a discretionary undertaking, but a process that *requires* courts to step in when agency action has been too long delayed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAND CANYON AIR TOUR COALITION, *Petitioner*, v. FEDERAL AVIATION ADMINISTRATION, *Respondent*, GRAND CANYON TRUST, *et al.*, *Intervenors*.	Nos. 97-1003, 97-1014, 97-1104, 97-1112, 97-1279

On Petitions for Review of an Order of the Federal Aviation Administration

Argued November 6, 1997

Filed September 4, 1998

Before: Silberman, Rogers and Garland, Circuit Judges.

Garland, Circuit Judge:

In response to an Act of Congress, the Federal Aviation Administration (the "FAA") developed a three-part plan to reduce aircraft noise from sightseeing tours in the Grand Canyon National Park (the "Park"). On December 31, 1996, the FAA issued the first final rule and proposed two further rules to implement the balance of the plan. In this case, we consider attacks on the final rule by four groups of petitioners: the Grand Canyon Air Tour Coalition (the "Coalition"), a group of 13 air-tour operators that fly visitors over the Park; the Clark County Department of Aviation and

the Las Vegas Convention and Visitors Authority ("Clark County"); the Hualapai Indian Tribe (the "Tribe" or "Hualapai"); and seven environmental groups led by the Grand Canyon Trust (the "Trust").

Three of the four petitioners—the Coalition, Clark County, and the Hualapai—essentially argue that the FAA's rule does "too much, too soon." The Trust, on the other hand, charges that the rule does "too little, too late." We reject both lines of attack and uphold the rule. We do so not because we necessarily believe the rule is "just right," but because we defer to the agency's reasonable exercise of its judgment and technical expertise, and because many of petitioners' attacks are not yet ripe in light of the phased nature of the FAA's proposed solution to the problem of aircraft noise.

I

The rule now before the court has a tortuous and complex history. In this Part of the opinion, we recount only so much of that history as is necessary to aid in our discussion.

A

In June 1987, the FAA issued Special Federal Aviation Regulation ("SFAR") No. 50-1, which regulated aircraft flying below 9,000 feet in the Park. *See* Special Flight Rules in the Vicinity of the Grand Canyon National Park, 52 Fed. Reg. 22,734 (1987). The regulation, set to expire on June 15, 1992, established minimum altitudes, routes, and noise-sensitive areas from which aircraft were barred. *See id.* at 22,739. The FAA promulgated the regulations to address safety concerns and because it "believe[d] that there is also a public interest in promoting a quiet environment in the canyon and minimizing the intrusion of aircraft noise on this environment . . . ." *Id.* at 22,735.

In August 1987, Congress enacted what is commonly referred to as the Overflights Act (the "Act"), *see* Pub. L. No. 100-91, 101 Stat. 676 (1987) (codified at 16 U.S.C. § 1a-1 note (1992)). The Senate Report accompanying the Act stated that SFAR 50-1 did "not adequately address the

adverse effects caused by low flying aircraft" above the Park and that "section 3 of this bill rectifies this inadequacy." S. REP. 100-125, at 8 (1987). Section 3 of the Act itself stated that:

> [n]oise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users.

Overflights Act § 3(a).

To address this problem, Congress required the Secretary of the Interior to submit to the Administrator of the FAA, within 30 days after the enactment of the Act,

> recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. *The recommendations shall provide for substantial restoration of the natural quiet and experience of the park* and protection of public health and safety from adverse effects associated with aircraft overflight.

Id. § 3(b)(1) (emphasis added). Although it left the content of the recommendations largely open-ended, Congress specifically required the Secretary to prohibit flights below the canyon rim, subject to certain exceptions, and to designate "flight free zones." *Id.* "Such zones shall be flight free," Congress said, "except for purposes of administration and for emergency operations," including the transportation of supplies and people to and from specified Indian villages. *Id.*

Next, Congress established an implementation schedule for the Secretary's recommendations:

> Not later than 90 days after receipt of the recommendations . . . and after notice and opportunity for hearing, the [FAA] shall prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon. The plan shall, by appropriate regulation,

> implement the recommendations of the Secretary without change unless the [FAA] determines that implementing the recommendations would adversely affect aviation safety.

Id. § 3(b)(2). If the FAA were to find an adverse effect on aviation safety, it was required, within 60 days and in consultation with the Secretary, to "eliminate the adverse effects on aviation safety and issue regulations implementing the revised recommendations in the plan." *Id.*

Finally, Congress directed the Secretary to submit to it, within two years after the effective date of the plan, "a report discussing (A) whether the plan has succeeded in substantially restoring the natural quiet in the park; and (B) such other matters, including possible revisions in the plan, as may be of interest." *Id.* § 3(b)(3).

B

In response to the Overflights Act, the Secretary of the Interior submitted recommendations to the FAA in December 1987. In June 1988, the FAA adopted the majority of those recommendations, modified slightly for safety reasons, and implemented them in the form of SFAR 50-2. *See* Special Flight Rules in the Vicinity of the Grand Canyon National Park, 53 Fed. Reg. 20,264 (1988). The regulation applied to aircraft flying below 14,500 feet and established, inter alia, minimum altitudes, four flight free zones covering 44% of the Park, four flight corridors through those zones, and specified flight routes.[1] Although the regulation was set to

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[1] A flight free zone is an area of the Park in which aircraft may not fly. A flight corridor is a passage, typically two to four miles wide, through which aircraft may traverse a flight free zone. *Id.* at 20,268. A flight route is the path a plane must follow for its entire tour, from its initial embarkation point to its final destination, including its path between and through any flight corridors. A route structure is the set of all the routes operators may fly in the Park. Although the FAA did not initially establish specific flight routes in the 1988 rule, the FAA's Flight Standards District Office in Las Vegas later created 29 routes, allowing commercial air tour operators access to designated areas of the Park. *See* National

expire on June 15, 1992, the FAA twice extended the expiration date,[2] first because the Secretary of the Interior's required report was not yet completed, and then because the FAA needed time to review the Secretary's recommendations and develop a new rule. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 40,120, 40,121 (1996) [hereinafter "Proposed Final Rule"].

On September 12, 1994, more than four years late,[3] the National Park Service ("the Park Service" or "NPS"), on behalf of the Secretary of the Interior, submitted the report to Congress required by section three of the Overflights Act. *See* National Park Service, U.S. Dep't of the Interior, Report on the Effects of Aircraft Overflights on the National Park System (1995) [hereinafter "NPS Report"]. In that report, the Park Service made three important definitional determinations. First, it decided that the appropriate measure for quantifying aircraft noise was the percentage of time that aircraft are audible ("percent of time audible"). *See* NPS

Park Service, U.S. Dep't of the Interior, Report on Effects of Aircraft Overflights on the National Park System 182 (1995).

[2] *See* Special Flight Rules in the Vicinity of the Grand Canyon National Park, 57 Fed. Reg. 26,764 (1992) (extending expiration date from June 15, 1992 to June 15, 1995); Special Flight Rules in the Vicinity of the Grand Canyon National Park, 60 Fed. Reg. 31,608 (1995) (extending expiration date from June 15, 1995 to June 15, 1997).

[3] Section 3 of the Overflights Act directed the Secretary to submit the report within two years after the effective date of the FAA's plan, which itself was required within 120 days after the statute's enactment. *See* Overflights Act § 3(b)(2), (3). The Act was enacted on August 18, 1987, but SFAR 50-2 was not implemented until June 1988. Thus, the September 12, 1994 submission of the report to Congress was more than four years late. A separate section of the Overflights Act, section 1, required the Secretary to submit an additional report to Congress within three years that would evaluate the impact of overflights in other national parks and make recommendations for legislative and regulatory action. *See id.* at § 1(d). The Park Service combined the section 1 report with the section 3 report and submitted them at the same time in a single document.

Report at 60. Second, the Park Service determined that an aircraft was audible if it increased the ambient noise level by three decibels, the smallest change perceptible to the human ear. *See* FAA, U.S. Dep't Transp., Environmental Assessment: Special Flight Rules in the Vicinity of Grand Canyon National Park 4-4 to -5 (1996) [hereinafter "Environmental Assessment"] (adopting Park Service criteria and noting that the three-decibel detectability criterion is "commonly accepted in the acoustics community"). Finally, the Park Service concluded that the key statutory phrase, "substantial restoration of the natural quiet," "requires that 50% or more of the park achieve 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day." NPS Report at 182.

Using these definitions, the NPS Report found that, although "compliance with SFAR 50-2 has been excellent, natural quiet is not yet substantially restored." *Id.* at 195. Instead, the Park Service found that only 34% of the Park enjoyed "a substantial restoration of natural quiet," by which it meant that in only 34% of the Park was aircraft noise no more than three decibels above ambient levels for at least 75% of the day. *Id.* at 13.[4] Moreover, the NPS Report predicted that without revisions to the regulation, the predicted growth in the number of flights would cause the percentage of the Park enjoying "substantial restoration" to drop to less than 10% by the year 2010. *See id.*

The Park Service concluded that it was "obligated, in pursuit of both its Congressionally mandated and defined management responsibilities, to seek a further restoration of natural quiet." *Id.* at 198. Accordingly, the NPS Report recommended that the FAA revise SFAR 50-2. It said that

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[4] As this usage indicates, when the Park Service discusses its current progress toward "a substantial restoration of natural quiet," it refers to the percentage of the Park enjoying natural quiet for 75% of the day. When it discusses the overall statutory goal of "substantial restoration of the natural quiet," however, it refers to a situation in which at least 50% of the Park achieves natural quiet for 75% of the day. Depending upon the context, we will use the phrase in the same two ways in this opinion.

noise reductions could be achieved by the expansion of flight-free zones, the operation of flights along paths taking advantage of natural land contours, the phase-in of quieter airplanes, the use of larger planes (on the assumption that larger numbers of people per flight would result in fewer total flights), and the limitation of flights to certain times of the day. *See id.* at 199-200.

In anticipation of the NPS Report, the Park Service and the FAA had issued an advance notice of proposed rulemaking seeking public comment on regulatory actions for all national parks, and specifically for the Grand Canyon National Park. *See* Overflights of Units of the National Park System, Advanced Notice of Proposed Rulemaking (ANPRM), 59 Fed. Reg. 12,740 (1994). The agencies sought comments on several proposals, including altitude restrictions, flight free periods, flight free zones, and incentives to use quieter aircraft. *See id.* at 12,744-45. The FAA received over 600 substantive comments on the Grand Canyon National Park, but two years later still had not proposed regulations, let alone finalized any.

In an Earth Day memorandum, issued on April 22, 1996, President Clinton directed the Secretary of Transportation, in conjunction with the relevant departments and agencies, to

> issue proposed regulations within 90 days to place appropriate limits on sightseeing aircraft over the Grand Canyon National Park to reduce the noise immediately and make further substantial progress toward restoration of natural quiet, as defined by the Secretary of the Interior, while maintaining safety in accordance with the Over- flights Act (Public Law 100-91). Action on this rulemaking to accomplish these purposes should be completed by the end of 1996.

Memorandum of April 22, 1996, Additional Transportation Planning to Address Impacts of Transportation on National Parks, 3 C.F.R. 278-79 (1996). The President also directed the FAA and National Park Service to achieve the substantial restoration of the natural quiet by 2008. *See id.* at 279.

In response to the President's directive, the FAA issued proposed regulations on July 31, 1996. In those regulations, the FAA proposed to expand the horizontal and vertical area covered by the existing regulations, create new and modify existing flight free zones to cover 87% of the Park, create new and modify existing flight corridors, develop specific flight routes for each operator, set a curfew for flights, establish a temporary cap on the number of flights, and require operators to submit flight reports. *See* Proposed Final Rule, 61 Fed. Reg. at 40,123-28.

C

On December 31, 1996, the FAA issued the final rule now before this court, and proposed two additional rules. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,302 (1996) [hereinafter "Final Rule"]. In the Final Rule and its associated Environmental Assessment, the FAA adopted the definitional determinations contained in the NPS Report. *See id.* at 69,306-10; Environmental Assessment at 4-4 to -5. The FAA also established new and modified existing flight free zones, established new and modified existing flight corridors, instituted flight curfews, set caps on the number of aircraft that can fly in the park, and established reporting requirements.

The Final Rule adopted most of the flight free zones proposed on July 31, 1996. *See* Final Rule, 61 Fed. Reg. at 69,311, 69,330-31. It enacted a curfew for the eastern portion of the Park, prohibiting flights during the summer season from 6 p.m. until 8 a.m. and in the winter season from 5 p.m. to 9 a.m. *Id.* at 69,316, 69,332. It established a cap on the number of aircraft that could fly in the Park, limiting each operator to the highest number it had used between July 31, 1996 and December 31, 1996, but did not establish a cap on the number of flights. *See id.* at 69,317, 69,332. The FAA concluded that, although the best way to address the noise problem "is through reducing noise at the source (i.e. quieter aircraft)," the aircraft cap was a necessary interim measure to ensure that the deterioration of the natural quiet

would not continue prior to the implementation of the noise limitation rule proposed on the same day. *See id.* at 69,317. Finally, the FAA adopted reporting requirements for operators. *See id.* at 69,324-25, 69,332. The FAA stated that this Final Rule, in combination with the proposed quieter aircraft rules, would substantially restore the natural quiet as required by the Overflights Act. *See id.* at 69,329.

In addition to the Final Rule now before us, the FAA proposed two further rules: one to establish new and modify existing flight routes; the other to require operators to use quieter aircraft. *See* Proposed Air Tour Routes for the Grand Canyon National Park, 61 Fed. Reg. 69,356 (1996) [hereinafter "Proposed Air Tour Routes"]; Noise Limitations for Aircraft Operations in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,334 (1996) [hereinafter "Proposed Noise Limitations" or "Quiet Technology Rule"]. The FAA said the proposed new routes were necessitated by the new flight free zones adopted in the Final Rule. It said that "the use of quieter, larger aircraft would provide two-fold benefits in reducing [the] noise of each operation and reducing the number of operations to carry the same number of passengers." Quiet Technology Rule, 61 Fed. Reg. at 69,340.

The FAA explained that its tripartite regulatory action was necessary because from 1988 to 1994, "that part of the Park experiencing a substantial restoration of natural quiet declined from 43% to 31%," and because the NPS Report had predicted that it would further decline to 10% by 2010. Final Rule, 61 Fed. Reg. at 69,317. The FAA predicted that the Final Rule, in conjunction with the two proposed rules, would meet the statutory goal of substantial restoration of the natural quiet by the year 2008. *See id.* at 69,329. The Final Rule alone, it said, would nearly achieve the statutory goal (raising the percentage to 49.3% in 1997), while implementing the proposed quieter aircraft rule as well would bring natural quiet to 57.4% of the Park by the year 2008. Environmental Assessment at 4-11.

The FAA set May 1, 1997 as the effective date for the Final Rule, anticipating that the new route structure would be in place by that time.

D

By February 1997, after reviewing comments on its proposed new routes, the FAA determined that it could develop better routes that would yield more noise reduction and have fewer adverse effects on tour operators and neighboring Indian tribes. To facilitate exploration of the best possible routes, the FAA stayed the effective date of the portions of the Final Rule that established the flight free zones, corridors, and related minimum altitudes from May 1, 1997 to January 31, 1998. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 62 Fed. Reg. 8862 (1997). The agency subsequently extended the effective date again, to January 31, 1999, "to allow the FAA time to establish a route structure" for the Park. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 62 Fed. Reg. 66,248 (1997). The FAA did not stay the effective date for the curfew, cap, or reporting requirements and found that the curfew alone would contribute to the substantial restoration of the natural quiet. *See* 62 Fed. Reg. at 8863.[5]

By October 1997, the FAA also discovered that it had significantly underestimated the number of aircraft operating in the Park. Shortly before oral argument in this case, the

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[5] On May 15, 1997, the FAA proposed the addition of two new flight corridors. *See* Establishment of Corridors in the Grand Canyon National Park Special Flight Rules Area, 62 Fed. Reg. 26,902, 26,904 (1997). In conjunction with the proposed corridors, the FAA also proposed a new route structure, subject to future modifications. *See* Notice of Availability of Commercial Air Tour Routes for the Grand Canyon National Park and Disposition of Comments, 62 Fed. Reg. 26,909 (1997). More recently, however, the FAA withdrew its proposal for the two corridors issued on May 15, 1997. The Federal Register withdrawal notice states that the agency is "presently considering alternatives to the National Canyon area for air tour routes." 63 Fed. Reg. 38,233 (July 15, 1998).

FAA issued a clarification of the Final Rule, stating that its original estimate of 136 aircraft was incorrect and that there were actually 260 aircraft. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 62 Fed. Reg. 58,898, 58,900 (1997) [hereinafter "Clarification"]. The FAA concluded that, although this did not warrant a revision of the Final Rule itself, it did mean that the Final Rule would be less effective than previously thought. The FAA nevertheless found that the Final Rule would still meet the goal of substantially restoring natural quiet "after implementation of the revised air tour routes and completion of the [Quiet] Technology rulemaking." *See id.*

To further assess the impact of the changed data, the FAA prepared a written reevaluation of its original Environmental Assessment. *See* FAA, U.S. Dep't of Transp., Written Reevaluation, Notice of Clarification, Environmental Assessment: Special Flight Rules in the Vicinity of Grand Canyon National Park (1997) [hereinafter "Reevaluation" or "Written Reevaluation of Environmental Assessment"]. Instead of achieving natural quiet in 49.3% of the Park as projected in the original Environmental Assessment, the Reevaluation concluded the Final Rule would achieve substantial restoration of the natural quiet in only 41.7% of the Park in 1997, decreasing to 34.2% in 2008. *See id.* at 20. At oral argument, the FAA acknowledged that this meant the proposed rule on quiet aircraft technology, and other alternatives, would have to make up the gap in order to achieve the 50% requirement contained in the Park Service definition. *See* Oral Arg. Tr. at 82, 84-85; FAA Supplemental Br. at 4. Although the FAA concluded in the Reevaluation that it could not also effectively cap the number of flights, as opposed to the number of aircraft, *see* Written Reevaluation of Environmental Assessment at 3, after oral argument the FAA informed this court that it is reconsidering a cap on the number of flights as well. *See* Letter from Ronald M. Spritzer, counsel for FAA, at 2 (Nov. 12, 1997) [hereinafter "FAA Letter"].

II

In this Part, we consider the challenges of the three groups of petitioners who essentially argue that the FAA did too much, and that what it did do was done too soon. These petitioners do not seriously challenge three of the provisions of the Final Rule: the curfew, aircraft caps, and reporting requirements. *See* Oral Arg. Tr. at 74-75. The Air Tour Coalition contends, however, that the government adopted a definition of "substantial restoration of the natural quiet" that is too restrictive of aircraft overflights, in contravention of the language and legislative history of the Overflights Act. The Coalition also contends that the FAA committed a series of errors that are fatal under the Administrative Procedure Act (APA). Clark County argues that the FAA should not have promulgated flight free zones until it was ready to issue final routes and corridors, and until it had more adequately assessed their environmental impact. Finally, the Hualapai Tribe maintains that the FAA issued its rule without adequately considering whether implementation of the expanded flight free zones would simply push the noise off the Park and onto the Hualapai Reservation, causing damage to its sacred sites and cultural resources.

A

The Air Tour Coalition contends that the Park Service and FAA interpretation of the key statutory phrase, "substantial restoration of the natural quiet and experience of the park," is overly restrictive of aircraft overflights because it is contrary to the "plain meaning" of the statute and its legislative history. The Coalition has identified four principal problems with the agency's interpretation.

First, the Coalition contends that the agencies erred in defining the term "natural quiet" without regard to other sounds in the Park. "Natural quiet," the Coalition argues, is not the absence of audible sound. According to the Coalition, the government's definition of "natural silence" as sound of up to three decibels ignores this point because it does not consider "prevailing sound conditions in the Park."

Coalition Br. at 10. "The faint, barely audible hum of a light plane," the Coalition maintains, "will not be noticed by, much less disturb, a visitor to roaring river rapids." *Id.* at 11.

We may dispense with this first argument without any statutory analysis, because it simply misapprehends the agencies' definition. The Final Rule does not define "natural quiet" as sound of up to three decibels; it defines it as sound of up to three decibels *above* "the ambient level." *See* Environmental Assessment at 4-4; *see also* NPS Report at 60 ("[P]ercent of time audible is a measure of how long aircraft sound levels protrude above all other sounds."). That is, an aircraft breaks the natural silence only when it is three decibels louder than the ambient sound—whether that sound is the roar of the river or the song of the birds.

Second, the Air Coalition contends that the government erred because it equated "quiet" with the absence of detectable sound, rather than with the absence of "noise" that would disturb visitors or disrupt their experiences of the park. *See* Coalition Br. at 12. The statute does not authorize the agencies to eliminate noise for its own sake, the Coalition insists, but only to increase the enjoyment of people on the ground. This assertedly follows from the plain language of the statute, which refers to the "natural quiet *and experience* of the park." Overflights Act § 3(b)(1) (emphasis added). It further follows from the legislative history which indicates, the Coalition says, that the Act was intended only to ensure "'a location where visitors can experience the park' free of disturbing aircraft noise." Coalition Br. at 12 (quoting 133 CONG. REC. S10799 (daily ed. July 28, 1987) (statement of Sen. McCain)).

There is also less than meets the eye to this second asserted dispute over statutory interpretation. We need not decide whether the Overflights Act would permit the govern- ment to ensure silence for silence's sake, because the agencies did not try to do so. To the contrary, this characterization of the agencies' views rests on a misreading of the FAA's brief and Federal Register notice, and of the NPS Report. The

Coalition contends, for example, that the FAA's brief "unabashedly concedes its belief that 'people' and people's experiences of the park are irrelevant under its approach." Coalition Reply Br. at 2. To support this contention, the Coalition cites a portion of the FAA's brief that responds to the Coalition's argument that the agency can only regulate those areas of the park "where people are more likely to be." But the FAA did not respond by saying the experience of Park visitors was irrelevant. Instead, it said that "the Overflights Act was . . . intended to address the problem of aircraft noise on a Park-wide basis in recognition of the fact that there may be 'back country users and other sensitive park resources.' " FAA Br. at 20 (quoting 133 CONG. REC. at S10799 (statement of Sen. McCain)).

The Coalition also misreads the Federal Register notice accompanying the Final Rule. That notice, according to the Coalition, confirms that the FAA intends to protect natural quiet, irrespective of visitor experience. *See* Coalition Reply Br. at 2 & n.5 (citing 61 Fed. Reg. at 69,308). But the cited page of the Federal Register says nothing of the sort. To the contrary, it is replete with agency references to the manner in which its definition of substantial restoration of the natural quiet responds to "visitors' experience."[6]

It is true, as the Coalition contends, *see* Coalition Reply Br. at 2 n.4, that the NPS Report refers to "natural quiet" as a "resource." *See* NPS Report at 10. But the full context of the reference makes clear that in the Park Service's view, natural quiet is a resource *because* it is relevant to visitor enjoyment:

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[6] *See, e.g.*, Final Rule, 61 Fed. Reg. at 69,308 ("The NPS definition of 'substantial restoration of natural quiet' involves time, area, and acoustic components. Because many park visitors typically spend limited time in particular sound environments during specific park visits, the amount of aircraft noise present . . . can have great implications for the visitors' opportunity to experience natural quiet in those particular times and places."); *id* ("Based on its studies, the NPS concluded that the visitors' opportunity to experience natural quiet during their visits and the extent of noise impact depends on a number of factors.").

"Intangible qualities" like "natural quiet . . . are important components of visitors' overall enjoyment of parks and *are thus* valued resources." *Id.* (emphasis added).[7] This concern for visitors' experience permeates the report. Indeed, the NPS explains that it chose "percent of time audible" as an appropriate index because it "found this metric to be best correlated with visitors' response to sound." *Id.* at 60.[8]

Finally, the Air Tour Coalition suggests two further, related ways in which the government's interpretation of the Overflights Act is invalid. First, the Coalition argues that the Park Service's decision to define "natural quiet" based on the decibel level a human ear can hear is unreasonable because it does not consider whether sound at that level would be disturbing. What the agency should have done instead, the Coalition insists, is looked to surveys of park visitors which show that only 34% report hearing aircraft, and only 5% report being "annoyed" by them. *See* NPS Report at 139.[9] Second, the Coalition contends, the government's effort to ensure quiet in 50% of the park for 75-100% of the day is also unreasonable because it does not consider "whether there will be any visitors present to be disturbed" in those areas. Coalition Br. at 10. Instead of trying to protect more than 50% of the Park, what the FAA should have done is simply re-routed air tours away from places where visitors concentrate, thus creating a "location where visitors can experience the park free of disturbing aircraft noise." *See id.* at 5.

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[7] *See also id.* at 78 ("Quiet itself . . . is an important element of the *feeling* of solitude. Quiet also *affords visitors* an opportunity to hear faint or very distant sounds. . . . Such an *experience* provides an important perspective on the vastness of the environment in which the *visitor* is located.") (emphases added).

[8] *See also id.* ("As will be discussed in Chapter 6, 'Effects on Visitor Experience,' percent of time audible is useful because it can be related to visitor reactions to the sound of aircraft overflights.").

[9] The same surveys indicate that 10% of park visitors report aircraft noise interferes with the natural quiet. *Id.*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), governs our analysis of the validity of an agency's interpretation of a statute. Following the familiar Chevron two-step, we first ask whether Congress "has directly spoken to the precise question at issue," in which case we "give effect to the unambiguously expressed intent of Congress." *See id.* at 842-43. But if Congress has been silent or ambiguous about the meaning of the specific question at issue, we defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 841. In the latter circumstance, the agency need only establish that its construction is "reasonable in light of the Act's text, legislative history, and purpose." *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997); *see also Chevron*, 467 U.S. at 844; *Appalachian Power v. EPA*, 135 F.3d 791, 800 (D.C. Cir. 1998).

There is nothing in the Overflights Act's reference to "natural quiet" that requires the FAA to define the term by survey results rather than decibel level. Indeed, the Coalition itself concedes that "the words 'natural quiet' are not self-defining" and that there is "ambiguity inherent in the term." *See* Coalition Reply Br. at 5. That being so, the only question for us is whether the agency has acted reasonably. We find nothing unreasonable in the agency's explanation for relying on acoustical measurements rather than visitor surveys.[10] Nor is there anything unreasonable about giving visitors the experience of silence by barring noise above the three-decibel level, even if "only" 34% of all Park visitors report hearing aircraft noise.

Similarly, nothing in the statute instructs the FAA to create only one or more locations of quiet and to herd all visitors

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[10] *See* Final Rule, 61 Fed. Reg. at 69,306 ("[T]he threshold of audibility used in the NPS model is louder than the level which would be detected by an attentive listener, guaranteeing that virtually all visitors would notice the noise while engaged in normal visitor activities."); NPS Report at 138 ("The nature and severity of impacts at specific sites within parks may not be captured by the judgments gathered in the exit visitor survey.").

into those quiet zones. Moreover, the statute speaks of the "substantial" restoration of the natural quiet. That term is also inherently ambiguous, and supports the agency's effort to regulate not only for the benefit of those visitors who prefer to congregate at visitors' centers, but also of those who prefer to see the back-country. Protecting 50% of the Park for 75% of the day gives the latter at least a reasonable chance of seeing the less-traveled areas in peace.

Nor is there anything in the legislative history that is inconsistent with the agency's approach or that renders it unreasonable. The Coalition principally relies on a quotation from Senator McCain of Arizona for the proposition that the purpose of the Overflights Act was only "to provide a location where visitors can experience the park essentially free from aircraft sound intrusions." 133 CONG. REC. at S10799 (statement of Sen. McCain), *cited in* Coalition Br. at 4, 9, 12. Although we ordinarily do not attach controlling weight to the "remarks of a single legislator, even the sponsor," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), it is worth noting that the Coalition has mischaracterized the Senator's position. It has done so, first, by failing to emphasize that the "purpose" Senator McCain was speaking of was not that of the Overflights Act as a whole, but rather of "flight free zones"—which are only one part of the regulatory regime envisioned by the statute. *See* 133 CONG. REC. at S10799. The Coalition also has mischaracterized the Senator's position by omitting his next sentence: "The boundaries of these flight-free zones are meant to be drawn *to maximize protection to the back country users and other sensitive park resources*." *Id.* (emphasis added). This is fully in accord with the essence of the FAA's position: it can draw flight free zones, and otherwise regulate aircraft noise, in order to protect not only those who choose the well-worn path, but also those who prefer the road less taken.

B

The Air Tour Coalition also maintains that the FAA's Final Rule should be remanded because the FAA committed a series of errors under the Administrative Procedure Act. Specifically, the Coalition contends the FAA failed to: permit comment on the definition of "substantial restoration of the natural quiet," respond to comments on that definition, adequately justify the definition, consider the interests of the air tour industry, explain its departure from prior regulations, and respond to comments in connection with the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. We reject all of these challenges for a mix of factual and legal reasons.

The APA requires agencies to provide notice and an opportunity to comment on proposed rules. *See* 5 U.S.C. § 553(c); *see also McLouth Steel Prod. Co. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988). The FAA did that here. The Final Rule was proposed in a Federal Register notice on July 31, 1996, and numerous comments were submitted. *See* Final Rule, 61 Fed. Reg. at 69,305-18 (summarizing and responding to comments). The Air Coalition's true complaint is not that it lacked an opportunity to comment, but that it was not permitted to comment meaningfully because the FAA viewed itself as bound to adopt the Park Service's 1995 definition, and so neither took the Coalition's comments into consideration nor responded to them. *See generally* Final Rule, 61 Fed. Reg. at 69,306 ("[T]he terms do not need additional comment under the Administrative Procedure Act."). Ordinarily, this would be a potentially winning administrative law argument. An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them. *See McLouth*, 838 F.2d at 1323. An agency must also demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant. *See Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

But the Overflights Act is not the ordinary statute. It envisions a regulatory program that is the product of two agencies and clearly divides the institutional responsibilities between them. It instructs that the "Secretary [of the Interior] shall submit to the Administrator [of the FAA] recommendations . . . [which] shall provide for substantial restoration of the natural quiet and experience of the park." Overflights Act § 3(b)(1). And it directs that the Administrator, after providing notice and an opportunity to be heard, "*shall . . . implement the recommendations of the Secretary without change* unless the Administrator determines that implementing the recommendations would adversely affect aviation safety." *Id.* § 3(b)(2) (emphasis added). Under this statutory scheme, the FAA was correct in believing that it had no choice but to adopt the Park Service's recommendations (except for any safety concerns the FAA might have), and hence that it did not need to provide additional comments of its own on the Interior Department's definition of the statutory terms. *See* Final Rule, 61 Fed. Reg. at 69,306.

We reached the same conclusion with respect to a similar statute in *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996). In that case, a hydroelectric producer, licensed by the Federal Energy Regulatory Commission (FERC) to build a dam, challenged a FERC order requiring it to adopt a fish passage plan conforming to one prescribed by the Department of the Interior. FERC issued the order pursuant to a statute providing that "[t]he Commission shall require the construction . . . of such fishways as may be prescribed by the Secretary of the Interior." *Id.* at 661 (quoting 16 U.S.C. § 811). In doing so, FERC declined to consider Bangor's arguments concerning the need for the fishway, concluding that under the statute it had no choice but to require Bangor to construct it. And in light of that statute, we held, as we hold here, that it was not the agency's "role to judge the validity of Interior's position—substantially or procedurally." *Id.* at 663; *see also*

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778 & n.20 (1984).[11]

Although the statutory scheme in *Bangor* relieved FERC of its obligation to respond to comments, it did not relieve the government of its obligation to promulgate regulations consistent with the law, or immunize those regulations from judicial review to determine whether they were arbitrary and capricious. *See Bangor*, 78 F.3d at 663-64; *see also Escondido*, 466 U.S. at 778 & n.20; *Southern Cal. Edison*, 116 F.3d at 519. Indeed, in *Bangor* we reviewed the rationality of the fishways prescription and vacated it because it lacked "reasonable support" and was not "reasonably related" to its goal. 78 F.3d at 664. Similarly, although the Overflights Act relieved the FAA of the obligation to respond to comments on the Park Service's definition, it did not relieve the government as a whole—that is, the Park Service and FAA together—of its obligation not to promulgate a rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The FAA does not dispute this point, or the Coalition's right to challenge the definition on those grounds before this court. *See* Oral Arg. Tr. at 111-13.

Moreover, in determining whether the Final Rule is arbitrary or capricious, we may consider only the regulatory rationale actually offered by the agency during the development of the regulation, and not the post-hoc rationalizations of its lawyers. *See Citizens to Preserve*

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[11] The Coalition's reliance on *McLouth Steel Products Co.*, 838 F.2d 1317, is misplaced. In denying a petition filed by McLouth under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, the EPA used a computer model it had developed previously. The agency refused to entertain or respond to comments on the model, despite never having previously exposed the model to comment. In so doing, the EPA failed to provide the opportunity to comment required by § 553 of the APA. *See* 838 F.2d at 1322-23. But as this recitation indicates, *McLouth* is not like either this case or *Bangor*: *McLouth* involved decision-making by a single agency, and no statute required it to adopt the computer model at issue.

Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 418 (1998); *see also Bangor*, 78 F.3d at 662 (holding that the FERC licensing requirement would have to be supported by the record before the agency). Hence, although the FAA would not have violated any APA procedural or quasi-procedural requirement by failing to respond to comments about the Park Service definition, the government would have risked the possibility that the justification for the definition previously offered by the Park Service (and submitted to the FAA) might not satisfy the APA's substantive requirement of agency rationality. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). For example, if any of those comments exposed a previously unrecognized irrationality in the Park Service definition, it would now be too late for the agency's lawyers to plug the gap.

Fortunately for the government, the Park Service did offer an adequate and reasonable justification for the definitions it chose. *See* NPS Report at 60, 78, 182. Moreover, notwithstanding the FAA's legal position that it need not offer anything in addition, the Final Rule further elaborated on that explanation. *See* Final Rule, 61 Fed. Reg. at 69,305-10. Most of that explanation has already been discussed at several places above. The Park Service noted that under the statute it was required to make a recommendation that would provide for "substantial" restoration of the natural quiet, and it concluded that a reasonable definition of "substantial" was one that restored natural quiet in at least half the park for most (75%) of the day. NPS Report at 182. The agency also reasonably read the statute's requirement that "natural" quiet be restored, to mean it should look to an increment above the ambient, natural sounds of the Park. *See id.* at 60. Finally, the agency reasonably chose to measure that increment based on the smallest sound "an attentive listener" could hear, because that measure could be easily "related to visitor reactions to the sound of aircraft overflights," *id.*, and because that measure best protected the experience of the back-country users, *see* Final Rule at 69,309-10; NPS Report at 13.

The Coalition further contends that, in formulating its rule, the FAA failed to take into consideration "the two policy goals to be accommodated in the Overflights Act—'the substantial restoration of the natural quiet and experience of the park' . . . and maintenance of viable air tourism in the GCNP." Coalition Br. at 14. But it is not by chance that the Coalition could put only the first of those goals in quotation marks. The second—maintenance of viable air tourism—is not mentioned in the Overflights Act. For evidence of this "goal," the Coalition is forced to look to a colloquy on the Senate floor between Senators Matsunaga and McCain. But again, even if we were to accord weight to a floor colloquy, the colloquy the Coalition has chosen shows only that "it was not our intent to *eliminate* the so-called air tour industry." 133 Cong. Rec. at S10800 (emphasis added). All the Senators agreed to was that "*when the essential values for which the park was created can accommodate such use*, air tours are perfectly appropriate." *Id.* (emphasis added). And Senator McCain further noted that "when it comes to a choice between the interests of our park system and those who profit from it, without a doubt, the interests of the land must come first." *Id.* at S10799.

But this argument is again beside the point. Contrary to the Coalition's suggestion, the FAA did consider the impact its regulation would have on the air tour industry. As the FAA explained, "[t]he primary policy reason for adopting this rule, is that it is the best compromise the FAA has been able to formulate to achieve the mandate of [the Overflights Act] and maintain a viable air tour industry serving GCNP." Final Rule, 61 Fed. Reg. at 69,328. Hence, whether it was *required* to do so or not, the Park Service did in fact consider the interests the Coalition represents.[12]

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[12] We also reject the Coalition's suggestion that the President's Earth Day memorandum, directing the agencies to complete their rulemaking by the end of 1996 and to achieve the substantial restoration of natural quiet by 2008, renders the FAA's decision suspect. The Coalition does not argue that the President's direction itself violated any statutory rule, but rather that as a consequence of the "haste" that it engendered, the FAA was

The Coalition also contends that the agencies failed to explain what the Coalition calls a "departure" from their prior course. In 1987 the Park Service recommended, and in 1988 the FAA adopted, SFAR 50-2, the first rule promulgated under the Overflights Act. That rule created air tour exclusion zones covering 45% of the Park. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 53 Fed. Reg. 20,264 (1988); *see also* Proposed Final Rule, 61 Fed. Reg. at 40,124. The Coalition notes that this led to a dramatic reduction in visitor complaints, as measured by visitor surveys. It argues that given this improvement under the old rule, the agency should have, but did not, explain why a new rule—which would expand flight-free zones to 87% of the Park—was necessary. We reject this argument for two reasons. First, the characterization of the FAA's 1996 Final Rule as a "departure" is somewhat of an overstatement, since the 1988 rule initially was set to expire in 1992. *See* 53 Fed. Reg. at 20,264. Hence, we cannot say that the 1988 rule expressed the government's final position on how to achieve the substantial restoration of the natural quiet; the Park Service did not adopt a final definition of that phrase until its 1994 Report to Congress.

But second, and contrary to the Coalition's contention, the government did explain why something more than the 1988 rule was necessary. The Park Service explained that although under SFAR 50-2, 34% of the Park enjoyed substantial restoration of natural quiet, without revisions to the regulation the percentage would drop to less than 10% by the year 2010. *See* NPS Report at 13. The Park Service noted that "air tours have increased significantly over the Canyon" in the years since the 1988 regulation, increasing from

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unable to offer a reasoned explanation for the Final Rule, and was otherwise unable to satisfy the requirements of the APA. Because we hold that the FAA's explanation for its Final Rule is reasonable, and that the promulgation of the rule satisfied the APA, the President's memorandum does not affect our analysis. *See generally Sierra Club v. Costle*, 657 F.2d 298, 407-08 (D.C. Cir. 1981).

120,180 in the year prior to the regulation to more than 187,000 in 1993, and that the number was expected to continue to increase still further. *Id.* "It is vital that this evaluation of [SFAR 50-2] be understood in the context of the predicted growth in the number of flights," the Park Service said. *Id.* Accordingly, the Service found that "natural quiet is not yet substantially restored," *id.* at 195, and that it was "obligated, in pursuit of both its Congressionally mandated and defined management responsibilities, to seek a further restoration of natural quiet," *id.* at 198. This is more than sufficient explanation for the government's decision to revise the 1988 rule.

Finally, the Coalition contends that the FAA failed to respond to comments on the inadequacy of its analysis under the Regulatory Flexibility Act, and failed to consider alternatives to the rule it adopted. We reject both challenges as factually inaccurate. The FAA did a lengthy analysis of the economic impact of the proposed rule on small businesses, as required by the Regulatory Flexibility Act, and responded to comments submitted by the Small Business Administration and other commenters. *See* Final Rule, 61 Fed. Reg. at 69,318-28. It also considered alternatives to the rule. The Coalition claims that the FAA flatly rejected its obligations to consider alternatives, stating that such consideration was " 'beyond the scope of this analysis.' " Coalition Br. at 15 (quoting 61 Fed. Reg. at 69,327-28). But that quotes the FAA too selectively. What the FAA said was that, "*[t]o recount all the alternatives that were considered* would be beyond the scope of this analysis." Final Rule, 61 Fed. Reg. at 69,328 (emphasis added). The FAA made clear, however, that it did consider alternatives, expressly listing seven that were recommended and noting that "[m]any combinations of all of these alternatives or recommendations were considered in developing this rule." *Id.*; *see also* Environmental Assessment at 2-1 to -14 (identifying and analyzing alternatives). The FAA thus satisfied the requirements necessary to demonstrate a rational decision-making process—that is, that it respond to relevant comments and consider reasonable alternatives. *See State Farm*, 463 U.S. at 51; *Professional Pilots*

Fed'n, 118 F.3d at 763. The Coalition does not describe any particular response as inadequate, nor does it point to any alternative that the agency irrationally rejected—other than the alternative of routing tours away from concentrations of visitors which, as we noted above, the FAA reasonably could reject.

C

The gravamen of Clark County's petition is that the FAA promulgated its flight free zones too soon. The FAA should not have done so, the County maintains, until it was also ready to promulgate the associated flight corridors and tour routes. Nor should the FAA have issued the flight free zones until it had more adequately assessed their environmental impact.

The County's first contention is that it was unreasonable for the FAA to promulgate expanded flight free zones without at the same time promulgating final routes, because that made it impossible to assess the effect of the flight free zones either on noise or on the viability of air tours. Without defined routes, Clark County says, it is "forced to guess where FAA might place routes amongst the almost infinite options left by the flight free zones." County Br. at 19. Underlying this dispute is the County's fear that the expanded flight free zones appear to have the effect of closing the lucrative Blue 1 route out of Las Vegas—the principal city in the County—without providing a viable alternative.

We should note that, ordinarily, agencies have wide latitude to attack a regulatory problem in phases and that a phased-attack often has substantial benefits. *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989); *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1058 (D.C. Cir. 1989). Indeed, at oral argument the Air Tour Coalition conceded that it would benefit from an early resolution of the definition of "substantial restoration," because that would enable it to "negotiate" an acceptable route structure with the government and the Trust. *See* Oral Arg. Tr. at 135-39; *id.* at

135-36 (advising that "[t]here is a national negotiated rulemaking that's currently pending" regarding air tours over other national parks).

But events have largely overtaken this dispute. Although the FAA did not originally make clear whether it would stay the implementation of the flight free zones until it issued the final corridors and route structure, thereafter the FAA represented to this court that it would extend the effective date of the flight free zones until that time. *See id.* at 97; *see also* FAA Supp. Br. at 11 (filed after oral argument, making same representation). Since then, the agency has formally extended the effective date to January 31, 1999. *See* Special Flight Rules in the Vicinity of Grand Canyon National Park, 62 Fed. Reg. 66,248, 66,248 (1997). Accordingly, whatever its merits, Clark County's contention that it was irrational for the agency to implement flight free zones until it issued final corridors and routes is now moot.

On the other hand, the County's underlying concern, that the flight free zones will have a negative impact on Las Vegas-based flights, is not moot. But it is also not yet ripe. We follow a two-pronged test in determining whether a challenge to a final rule is ripe for review. First, we consider the "fitness of the issues for judicial decision." This involves an inquiry into "whether the court or agency would benefit from postponing review until the policy in question has sufficiently crystallized." *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (internal quotations omitted). "The court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting militate in favor of postponing review if, for example, the court finds that resolution of the dispute is likely to prove unnecessary or that the court's deliberations might benefit from letting the question arise in some more concrete form." *Id.* (internal quotations omitted). Second, if a challenged decision is not "fit" for review, we must consider whether postponing review will cause the petitioner "hardship." *Id.*

In light of the fact that the FAA is still working on corridors and routes, the County's challenge to the flight free zones is not fit for review at this time. As the County's own argument makes clear, neither it nor we can assess whether the flight free zones will hurt the County, or how much they will do so, until we know which new routes and corridors through the flight free zones the FAA will authorize. "The effects of the Final Rule," the County correctly notes, "depend on where FAA places flight tracks for air tour operations . . . ." County Br. at 18. Waiting until those new routes and corridors are issued may make "resolution of the dispute . . . unnecessary." *Florida Power*, 145 F.3d at 1421, because they may accommodate the Las Vegas flights that are the County's principal concern. At a minimum we will "benefit from letting the question arise in [a] concrete form." *Id.* Moreover, given the FAA's stay of the flight free zones pending promulgation of new routes and corridors—which permits the Blue 1 route to continue to operate in the interim—the County will not suffer hardship as a result of the postponement. Accordingly, this challenge by the County is not currently ripe for review.

The same is true of the County's contention that the FAA violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, by concluding in its Environmental Assessment that the Final Rule would have no significant environmental impact. *See* Environmental Assessment (J.A. 151-52).[13] The County contends that if the effect of the Final Rule is to close Blue 1 without providing a viable alternative, it would cause significant environmental effects by shifting tourists from air to ground transportation. Without

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[13] Based on that Assessment, the agency determined that the Final Rule warranted a "finding of no significant impact." *See* Final Rule, 61 Fed. Reg. at 69,318. If correct, this finding means that the FAA was not obligated under NEPA to prepare an environmental impact statement. *See* 40 C.F.R. §§ 1501.4, 1508.13 (1997); *see also Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d 256, 265-68 (D.C. Cir. 1988); *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985).

considering the legal merits of this argument, it is clear that we cannot evaluate it factually without knowing whether the final list of routes and corridors will leave air tour operators without a viable alternative.[14]

D

The Hualapai Tribe also makes what amounts to an argument that the FAA issued its Final Rule too soon, because it failed to consider first whether the establishment of the expanded flight free zones would push aircraft noise off the Park and onto the Hualapai Reservation. The consequences of such a shift, the Tribe contends, would be harm to the Tribe's traditional cultural properties, sacred sites, ongoing religious and cultural practices, natural resources, and economic development. In the Tribe's view, the FAA's failure to consider these consequences, and to consult with the Tribe about them, violated the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, NEPA, the APA, and the United States' trust obligation to the Tribe.

We find these arguments unripe for consideration for the same reason we found the County's arguments unripe. Until we know what routes the air tours will take, we simply cannot assess whether, or how much, they will affect the Reservation. Holding off that assessment until the routes are concrete may make our resolution of the dispute unnecessary. *See* FAA Br. at 39 ("The FAA has committed to ensuring that any new routes that are located above the Hualapai Reservation avoid historic, cultural and religious sites."); *id* at 45 ("The final routes may well meet many of the Tribe's anticipated [environmental] concerns."). Such a postponement surely will facilitate any review that is

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[14] In light of this resolution, we do not consider whether Clark County would have standing under NEPA based on its assertion that, because the FAA's action will cause tourists to travel to the Park by ground rather than by air, the County will be injured by an increase in vehicular emissions within the County. *See generally Florida Audubon Soc'y v. Bentson*, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc).

necessary. And since the flight free zones have been stayed in the interim, postponement will not injure the Tribe.[15]

The FAA also has represented that it will continue to consult with the Tribe regarding the location of routes, and to evaluate the noise impact of different routes on the Tribe, during the period prior to issuance of final routes. *See* Final Rule, 61 Fed. Reg. at 69,306-07; *see also* FAA Br. at 38-39, 45, 46. Accordingly, if it has not done so already, the FAA still has time to satisfy any consultative obligations it may have before a final plan is implemented.[16]

The Tribe does not seriously dispute these conclusions. It "recognizes that if the FAA completely removes all routes from tribal lands, it will not be impacted." Hualapai Reply Br. at 6. But it forthrightly states that it filed its current petition because it feared that if had it waited until the FAA promulgated the routes, it would have missed the deadline for petitioning for review of the 1996 rule and hence be foreclosed from obtaining review. This was a perfectly appropriate reason for filing the petition. *See Eagle-Picher*

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[15] The same analysis applies to the Tribe's allegation that overflights that "directly and substantially impair the use of" reservation lands would constitute an unlawful taking of those lands. Until the routes and corridors are established, it is not possible to tell whether there will be overflights that impair the Tribe's use of its lands. And as long as the FAA continues to stay the effective date of the flight free zones, such overflights will not occur.

[16] In its brief, the Tribe contended that under its trust obligations, the United States was required, but failed, to consult with it on a government-to-government basis while developing the Final Rule. The FAA, however, cited considerable evidence that consultations have occurred. *See, e.g.*, Final Rule, 61 Fed. Reg. at 69,305-07 (outlining consultations with Indian tribes); Environmental Assessment at 4-19 to -21, 4-23 (outlining meetings with Hualapai and other tribes to review impact on historical sites and socio-economic interests of tribes). At oral argument, the Tribe reformulated its argument, conceding that there had been consultations, but contending that they had not been meaningful. *See* Oral Arg. Tr. at 50-51.

Indus., Inc. v. EPA, 759 F.2d 905, 909 (D.C. Cir. 1985). But "our finding of unripeness gives petitioners the needed assurance" that they will not be foreclosed from judicial review when the appropriate time comes. *Public Citizen v. NRC*, 940 F.2d 679, 683 (D.C. Cir. 1991). This is because a "time limitation on petitions for judicial review . . . can run only against challenges ripe for review." *Baltimore Gas & Elec. Co.*, 672 F.2d 146, 149 (D.C. Cir. 1982). When the corridors and routes finally are promulgated, the Tribe and the other petitioners will be able to raise issues that specifically arise from the interrelationship between the flight free zones and those routes and corridors.

III

We now turn to the arguments of the Grand Canyon Trust, which attack the FAA's Final Rule from the opposite side—not as constituting too much, too soon; but as being too little, too late. The Trust has little quarrel with the individual elements of the Final Rule—the flight free zones, curfews, aircraft caps or reporting requirements. But it argues that they are not enough to achieve Congress' goal, and that the agency has delayed action for far too long. The Final Rule is too little, the Trust contends, because the government's definition of substantial restoration does not restore as much natural quiet as the statute requires. The Final Rule is too late, the Trust charges, because a rule that will not achieve substantial restoration until the year 2008 is inconsistent with the statutory goal.

A

The Trust argues that for four reasons, the Final Rule's definition of substantial restoration of the natural quiet—that 50% of the Park achieve natural quiet for at least 75% of the day—does not satisfy the Overflights Act.

First, the Trust contends that Congress intended more than half of the Park to be free of aircraft noise 100% of the time, a percentage the government's 75% figure will not

necessarily achieve in any area.[17] But the statute does not say that a substantial area of the Park must be quiet 100% of the time. The statutory goal is simply the "substantial restoration of the natural quiet," a phrase too broad and ambiguous to read as "address[ing] th[is] precise question." *Chevron*, 467 U.S. at 843. The Act does require the designation of "flight free zones," but even if the Final Rule permits noise to leak into those zones,[18] the statutory language still requires only that the zones be "flight free," not "noise free."

Faced with the absence of support in the Act's language, the Trust looks instead to the legislative history. But, like the Air Tour Coalition, it is unable to point to anything other than an isolated floor statement in support of its position. Indeed, the irony is that the Trust points to the same floor statement that the Coalition contends supports its opposite view: Senator McCain's statement that the flight free zones were intended to provide a location "where visitors can experience the park essentially free from aircraft sound intrusions." 133 CONG. REC. at S10799. Again putting to one side the fact that this was the statement of a single Senator, a location "essentially free from aircraft sound intrusions" is not necessarily inconsistent with one that is quiet for at least 75% of the day and for 100% of the night (during which air tours do not fly). That is particularly so in light of the Senator's declaration, in the same statement, that "[t]his measure . . . resists the wide-spread impulse to

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[17] That is not to say there will be no such areas. There are a number of back-country areas of the Park that experienced almost a complete absence of aircraft sound even under the previous rule. *See* NPS Report at 187-88; Environmental Assessment at 4-13 to -15 (tables describing three locations at which aircraft are audible for only 0-4 % of the day, and one where they are audible 0-9%).

[18] The FAA found that because of the way aircraft sound carries in the Canyon, it was able, for some part of the time, "to fully penetrate to the center of every flight-free zone created by" the previous rule. *See* Final Rule, 61 Fed. Reg. at 69,309. The record does not disclose whether the same will result for the expanded flight free zones created by the new rule.

micromanage, by setting out a framework and leaving the real decisions up to the agencies with the expertise to make them." *Id.* Indeed, that declaration accords well with the Supreme Court's suggestion in *Chevron* that where Congress leaves a statutory term undefined, it makes an implicit "delegation of authority to the agency to elucidate a specific provision of the statute" through reasonable interpretation. 467 U.S. at 843-44. We cannot say the FAA has exercised that delegated power in an unreasonable way.

The Trust contends, second, that even if the statute does not require the agency to create completely noise-free areas, the Park Service definition still does not provide "substantial" restoration. It argues that the "dictionary meaning" of "substantial" is "more than half." It then argues that a rule requiring that 50% of the Park be quiet for 75% of the day, is mathematically equivalent to one yielding a "restoration" value of only 37.5%, because 50% x 75% = 37.5%. Neither the statute nor the legislative history compels acceptance of either part of this argument.

"Substantial" may well be defined as meaning "more than half." *See* Webster's Third New International Dictionary 2280 (1993) ("being that specified to a large degree or in the main") (4th meaning). But it also has a host of much vaguer dictionary meanings, ranging from "not seeming or imaginary," *id.* (1st meaning), to "considerable in amount," *id.* (2nd meaning). *See Victor v. Nebraska*, 511 U.S. 1, 19 (1994) ("[O]n the one hand, 'substantial' means 'not seeming or imaginary'; on the other, it means 'that specified to a large degree.' "). Indeed, in the administrative law context, we refer to "substantial" evidence as meaning "more than a scintilla, but less than a preponderance." *Burns v. Office of Workers' Compensation Programs*, 41 F.3d 1555, 1562 n.10 (D.C. Cir. 1994) (internal quotations and citation omitted). In short, the term is simply too ambiguous to compel the "plain meaning" claimed by the Trust, and more than sufficiently elastic to support the agency's definition as reasonable.

But even if "substantial" does mean "more than half," the agency's definition of substantial restoration effectuates that meaning by requiring that more than half of the Park be silent more than half—indeed, more than three quarters—of the time. The Trust's mathematical equation, while creative, does not persuade us otherwise.[19] There is no support in the statute or legislative history for requiring that kind of numeric calculation, nor for its unstated premise: that "substantial" pertains to a combination of space and time, rather than to each variable considered separately.

The Trust's third contention is that the agency's definition of substantial restoration was infected by impermissible consideration of the needs of the air tour industry, as was the timetable the agency adopted for final achievement of substantial restoration. As we have noted above, the FAA did consider the impact its regulation would have on the viability of the air tour industry, explaining that "[t]he primary policy reason for adopting this rule, is that it is the best compromise the FAA has been able to formulate to achieve the mandate of [the Overflights Act] and maintain a viable air tour industry serving GCNP." Final Rule, 61 Fed. Reg. at 69,328. The Trust argues not only that such considerations are not required—as the Air Coalition insists—but that they are not even permitted.

We see nothing in the Overflights Act that forbids the government from considering the impact of its regulations on the air tour industry. Congress, after all, required "substan-

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[19] Clark County has an equally imaginative mathematical reply. The Final Rule, it points out, requires that 50% of the Park be quiet 75% of a 12-hour day—not 75% of a 24-hour day. hen this is combined with 100% silence during the 12-hour night, the correct calculation is: (50% x 75%) + (50% x 100%), which results in a "restoration" of 87.5%. *See* Clark County Intervenor Br. at 10-11. This calculation may be a bit too creative. Because air tours have never flown at night, it is hard to see how silence during that period can be considered part of any "restoration." On the other hand, the curfew, which extends the period of 100% silence beyond 12 hours, may well raise the "combined" percentage above the Trust's calculation of 37.5%.

tial restoration of the natural quiet," not total restoration. The statute's provisions for flight free zones and restrictions on flight altitudes, *see* Overflights Act § 3(a)(1), and for a plan to "manag[e] air traffic in the air space above the Grand Canyon," *id.* § 3(a)(2), indicate that Congress contemplated some overflights would continue. *See also* 133 CONG. REC. at S10799 (statement of Sen. McCain) ("I believe this bill will enable the air tour industry to continue to thrive."). The FAA's statement does not indicate that the agency considered maintenance of a viable air tour industry in derogation of its statutory responsibility to issue a plan that would provide for substantial restoration of the natural quiet. To the contrary, the agency said the Final Rule was a compromise that still would "achieve the mandate" of the Act. Final Rule, 61 Fed. Reg. at 69,328; *see also id.* ("It is the intent of the rule adopted to permit the continuation of aerial viewing of the canyon . . . in a manner *consistent with the stated purposes of section 3 [of the Overflights Act] to substantially restore the natural quiet* of the Grand Canyon . . . .") (emphasis added). As long as that is so, we do not find anything in the statute that would bar the agency from considering this issue in the course of promulgating its regulatory plan.[20]

Fourth, the Trust contends that the FAA inadequately considered alternatives—or, better put, additions—to both the final and proposed rules. These primarily include a cap not only on the number of aircraft but also on the number of flights, and a more expedited conversion to quieter aircraft. The Hualapai Tribe makes the same argument regarding the flight cap, and Clark County makes a similar argument about quieter aircraft—although the County regards quieter air-

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[20] We should note that the agency's concern for the tours was at least as much for air tour passengers as for air tour operators. *See, e.g.*, Final Rule, 61 Fed. Reg. at 69,309 ("[V]iewing the canyon from the air is a legitimate and valuable means of appreciating the beauty of the Grand Canyon."); Proposed Final Rule, 61 Fed. Reg. at 40,134 ("[C]ommercial sightseeing operators provide a valuable public service by creating a unique way [for] all to view the Grand Canyon and provide an effective means for elderly and handicapped individuals to enjoy the park.").

craft as an alternative, rather than an addition, to the Final Rule's expanded flight free zones. These complaints have largely been mooted, or rendered unripe, by recent developments. The new data on the number of aircraft flying in the Park has persuaded the FAA that in order to achieve substantial restoration it will have to reconsider implementing both of these options. *See* FAA Letter at 2 (Nov. 12, 1997); Oral Arg. Tr. at 82, 84-85. Since the FAA has committed itself to reconsidering these options, now is not the time to decide whether a failure to adopt them would be arbitrary or capricious.

B

Finally, we address the Trust's argument that the Final Rule achieves a substantial restoration "too late," and its request that we "(1) require the agencies within 60 days to issue regulations that will immediately achieve the substantial restoration of natural quiet . . .; (2) direct that the regulations . . ., at a minimum, establish[ ] flight-free zones sufficiently large that 50% of the Park is noise-free; and (3) retain jurisdiction over this matter to ensure compliance . . . ." Trust Br. at 17-18 (emphasis in original). As an "interim measure," the Trust asks us to order "an immediate cap of 40,000 annual air tour overflights." *Id.* at 18.

Although the APA gives courts the authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) [hereinafter "*TRAC*"], we are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case. As a court we have no idea what the unintended consequences of immediately imposing an expansion of the flight free zones—which under the Final Rule already will cover 87% of the Park—might be. In addition to air safety concerns, it is possible that implementing such zones would do no more than shift the flights and their noise from the Park to the Hualapai Reservation. Nor do we know what the consequences of ordering a cap on flights would be, or

whether there might be other regulations that could better do the job. That, of course, is why such considerations normally are the province of expert agencies rather than courts—and, as noted above, the FAA currently is considering such options. Moreover, although the Trust's frustration with the agencies' slow and faltering pace is understandable, we cannot say it has made out a case for the immediate imposition of so drastic a remedy.[21]

The language of the Overflights Act does manifest a congressional concern with expeditious agency action. The Act required the Secretary of the Interior to submit to the FAA recommendations, providing for "substantial restoration of the natural quiet and experience of the park," within 30 days of its enactment. It required the FAA to issue a final plan not more than 90 days later. Overflights Act § 3(b)(1), (2). Both agencies were late in carrying out these obligations. The Act also required that within two years of its effective date, the Secretary was to submit a report to Congress discussing "whether the plan has succeeded in

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[21] When deciding whether to grant a petition for mandamus on the ground of agency action unreasonably delayed, this court is guided by the following criteria:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (D.C. Cir. 1984); *see also Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 994 n.1 (D.C. Cir. 1996); *DiCola v. FDA*, 77 F.3d 506, 509-10 (D.C. Cir. 1996).

substantially restoring the natural quiet in the park" and "such other matters, including possible revisions in the plan, as may be necessary." *Id.* § 3(b)(3). The Park Service was again late in complying—this time by more than four years. It took another two years—and an order from the President—for the FAA to respond to the NPS Report and to issue the Final Rule now before us. And, as we have noted above, it was not until after it issued that rule that the FAA realized that some of its key assumptions were grossly inaccurate, and that still further modifications would be required to achieve Congress' goal.

The statute's timing provisions do not, however, support the Trust's contention that Congress "intended the job to be done in 120 days." Trust Br. at 14. What Congress demanded within 120 days was the issuance of a regulatory plan that would achieve the goal of substantial restoration; it did not direct that substantial restoration actually be in place on the 121st day. Indeed, the provision for a report, which was to discuss whether the plan had succeeded and suggest revisions, makes clear Congress contemplated that the agencies' first plan might not succeed and might have to be revised—as the agencies have done in the regulatory plan at issue here.

There is more force to the Trust's argument that, even if Congress had no specific timetable in mind, it was unreasonable for the FAA to wait ten years to issue a regulation requiring substantial restoration, and then to issue one that permits another ten years to pass before substantial restoration is achieved. But although the FAA was tardy, it is unfair to characterize it as doing nothing during those first ten years. It issued SFAR 50-2, which went part of the way toward restoration. As Congress directed, the government then evaluated progress under that regulation, found it wanting, and eventually proposed the current rule. Although it was undeniably slow in doing so, this is the first time any party has challenged the agency's delay in court. That is not to say, as the FAA implies, that this somehow estops the Trust from complaining. But this is not a case where an

agency has been contumacious in ignoring court directions to expedite decision-making.

Nor can we accept the Trust's argument that issuing a rule that does not contemplate final achievement of Congress' goal for ten years is inherently unreasonable. The issues involved here are complex. It is clear from the record that achieving substantial restoration will require a multitude of agency actions, including the entry into service of quieter aircraft. Nothing in the Trust's submissions demonstrate that this can be achieved "immediately." Similarly, as we have noted above, the interrelationship between the flight free zones and the routes and corridors is complicated, as is the effect these together will have on the surrounding land, including the Hualapai Reservation.

Finally, we also note the Trust's complaint that even using the Park Service's own definition, the Final Rule will not achieve substantial restoration of natural quiet; and that the FAA's latest reevaluation of the data indicates that not even that rule plus the two proposed rules will achieve Congress' goal. We agree that it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all. Indeed, counsel for the FAA conceded as much in oral argument. Oral Arg. Tr. at 85-86, 89-90, 116.

But the FAA has not taken that course here. It has never defended the Final Rule as the sole means for restoring the natural quiet, but only as the first of three steps. Its contemplation was that the three rules together would achieve that goal by 2008. *See* Final Rule, 61 Fed. Reg. at 69,306; Noise Limitations Rule, 61 Fed. Reg. at 69,338. For the same reason that we questioned the validity of Clark County's contention that the FAA should have held up promulgation of the Final Rule until it had all three rules ready, we reject the Trust's contention that the FAA must give birth to all three today. *See City of Las Vegas v. Lujan*, 891 F.2d at 935 (finding that "agencies have great discretion to treat a

problem partially" and holding that court will not strike down agency action "if it were a first step toward a complete solution"); *General Am. Transp. Corp.*, 872 F.2d at 1058.

The FAA acknowledges that the new data on the number of aircraft overflying the Park renders its original three-part plan less effective than originally assumed. The FAA has represented, however, that it still anticipates meeting the goal of substantial restoration by 2008. *See* Oral Arg. Tr. at 82, 90. To do this, "[q]uiet aircraft technology will obviously have to make up the gap in 2008, together with the route structure." *Id.* at 82. The FAA also will consider using a cap on the number of overflights. *See* FAA Letter at 2. The FAA has assured this court that it still believes that "the quiet technology rulemaking and the finalization of the air tour routes, when completed, will result in attainment of the statutory goal." FAA Supp. Br. at 4.

We will take the government at its word. *See Orion Communications Ltd. v. FCC*, 131 F.3d 176, 182 (D.C. Cir. 1997). If the FAA does not issue additional regulations reasonably promptly, or if those regulations do not appear likely to achieve the statutory goal on a reasonable timetable, the Trust may petition to compel agency action unlawfully withheld or unreasonably delayed. But we are not at that point yet, and hence can do no more than affirm the rule currently before us.

IV

For the foregoing reasons, the petitions for review of the Final Rule are denied. We note, however, that we have held unripe those of petitioners' challenges that specifically arise out of the interrelationship between the Final Rule's flight free zones, and the still-uncertain flight corridors and routes. Accordingly, those challenges may be raised again when the corridors and routes finally are promulgated.[22]

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[22] This reservation applies only to challenges specifically arising out of the interrelationship between the zones and the routes and corridors. It does not, for example, apply to a challenge to the agency's interpretation of the statutory phrase, "substantial restoration of the natural quiet," as we have found the present challenges to that interpretation ripe and have upheld the agency's interpretation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1003 [FILED Nov. 4, 1998]

Grand Canyon Air Tour Coalition,
Petitioner,

v.

Federal Aviation Administration,
Respondent

Grand Canyon Trust, et al.,
Intervenors.

Consolidated with 97-1014, 97-1104, 97-1112, and 97-1279

BEFORE: Silberman, Rogers and Garland, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of the Grand Canyon Trust, et al. filed October 19, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1003 [FILED Nov. 4, 1998]

Grand Canyon Air Tour Coalition,
Petitioner,

v.

Federal Aviation Administration,
Respondent

Grand Canyon Trust, et al.,
Intervenors.

Consolidated with 97-1014, 97-1104, 97-1112, 97-1279

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the Suggestion for Rehearing In Banc of the Grand Canyon Trust, et al., and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

January 22, 1999

Mr. Jonathan S. Franklin
Hogan & Hartson
555 Thirteenth Street, NW
Washington, DC 20004

Re: Grand Canyon Trust, et al.
v. Federal Aviation Administration,
et al.
Application No. A-600

Dear Mr. Franklin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on January 22, 1999, extended the time to and including March 4, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Ruth Jones
RUTH JONES
Assistant Clerk

APPENDIX E

PERTINENT FEDERAL STATUTES

The National Parks Overflights Act, codified at 16 U.S.C. § 1a-1 note, provides in pertinent part:

Sec. 3. Grand Canyon National Park

(a) Noise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users.

(b) Recommendations.—

(1) Submission.—Within 30 days after the enactment of this Act [Aug. 18, 1987], the Secretary shall submit to the Administrator recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. The recommendations shall provide for substantial restoration of the natural quiet and experience of the park and protection of public health and safety from adverse effects associated with aircraft overflight. Except as provided in subsection (c), the recommendations shall contain provisions prohibiting the flight of aircraft below the rim of the Canyon, and shall designate flight free zones. Such zones shall be flight free except for purposes of administration and for emergency operations, including those required for the transportation of persons and supplies to and from Supai Village and the lands of the Havasupai Indian Tribe of Arizona. The Administrator, after consultation with the Secretary, shall define the rim of the Canyon in a manner consistent with the purposes of this paragraph.

(2) Implementation.—Not later than 90 days after receipt of the recommendations under paragraph (1) and after notice and opportunity for hearing, the Administrator shall prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon. The plan shall, by appropriate regulation, implement the recommendations of the Secretary without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety. If the Administrator determines that implementing the recommendations would adversely affect aviation safety, he shall, not later than 60 days after making such determination, in consultation with the Secretary and after notice and opportunity for hearing, review the recommendations consistent with the requirements of paragraph (1) to eliminate the adverse effects on aviation safety and issue regulations implementing the revised recommendations in the plan. In addition to the Administrator's authority to implement such regulations under the Federal Aviation Act of 1958 [section 1301 *et seq.* of Title 49], the Secretary may enforce the appropriate requirements of the plan under such rules and regulations applicable to the units of the National Park System as he deems appropriate.

(3) Report.—Within 2 years after the effective date of the plan required by subsection (b)(2), the Secretary shall submit to the Congress a report discussing—

(A) whether the plan has succeeded in substantially restoring the natural quiet in the park; and

(B) such other matters, including possible revisions in the plan, as may be of interest. The report shall include comments by the Administrator regarding the effect of the plan's implementation on aircraft safety.

5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

No. 98-1417

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT CLARK COUNTY DEPARTMENT OF AVIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1417

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT CLARK COUNTY DEPARTMENT OF AVIATION

REASONS FOR DENYING THE PETITION FOR A WRIT

This case involves no legal issues that would warrant issuance of a writ of certiorari. Instead, the decision at issue involved the straightforward application of case-specific facts to well-established case law regarding whether agency action is "unreasonably delayed" under section 706(1) of the Administrative Procedure Act ("Section 706(1)"). 5 U.S.C. § 706(1). Further, there are no splits of authority between this case and other Circuits or other legal issues of national importance.

Petitioners Grand Canyon Trust, *et al.* ("Trust"), claim that the Federal Aviation Administration ("FAA") and the National Park Service ("NPS") have unreason-

ably delayed promulgating regulations to "substantially restore the natural quiet" of Grand Canyon National Park ("Grand Canyon"). The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") found no unreasonable delay and dismissed the Trust's petition for review. *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir 1998), Trust Petition for a Writ of Certiorari ("Trust Pet.") at App. A.

The Trust's chief charge of error to this Court is that the decision in this case was a departure from D.C. Circuit precedent regarding "unreasonable agency delay." The Trust has based its unreasonable delay argument almost exclusively on counting the number of years that will elapse between the enactment of the National Parks Overflights Act of 1987, P.L. 100-91, 101 Stat. 674 (the "Overflights Act"), and the 2008 "goal" that President Clinton set for NPS and FAA to attain the "substantial restoration of the natural quiet" required by the Overflights Act.

However, as discussed below, the Trust fundamentally misreads both the decision in this case and D.C. Circuit precedent. The D.C. Circuit's decision was consistent with its own precedent and the requirements of Section 706(1).

Accordingly, Respondent Clark County Department of Aviation strongly recommends that this Court deny the Trust's Petition for a Writ of Certiorari.[1]

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[1] The Clark County, Nevada, Department of Aviation ("Clark County") appeared as a party to this case before the D.C. Circuit. On February 24, 1997, Clark County submitted a petition for review of the same FAA final rule that the Trust challenged. The D.C. Circuit consolidated review of the matters on May 15, 1997. In addition, Clark County filed a motion to intervene on behalf of the government in the Trust's challenge on April 25, 1997. The D.C. Circuit granted that motion on May 15, 1997.

I. THE DECISION BELOW PROPERLY APPLIED THE FACTS OF THIS CASE TO ESTABLISHED PRINCIPLES OF LAW REGARDING REVIEW OF ALLEGED AGENCY DELAY

Fifteen years ago, the D.C. Circuit organized into a single test its precedent regarding "unreasonable" agency delay under Section 706(1). *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). Since *TRAC* was decided, the D.C. Circuit and other federal courts have applied the *TRAC* test repeatedly without significant variation from the original test. The D.C. Circuit's dismissal of the Trust's petition represented another example in a long line of straightforward applications of the *TRAC* precedent. The decision never suggested that the court considered that it was diverging in any way from its line of "unreasonable delay" precedent or limiting the ability to challenge agency delay.

A. The D.C. Circuit's Test for "Unreasonable Delay" Requires a Case-by-Case Assessment of the Circumstances Surrounding Agency Delay

The D.C. Circuit based its analysis in *TRAC* on an understanding that courts owe administrative agencies considerable deference in setting schedules for agency action. Thus, only extreme cases of agency delay justify judicial intervention in the form of mandamus. *TRAC*, 750 F.2d at 79. *See also In re International Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (mandamus based on "unreasonable delay" is reserved for "extraordinary circumstances"); *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) ("Any discussion of the standards relevant to the issue of delay must begin with recognition that an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings.").

Based on this understanding of the limits of the judicial role and the Section 706(1) cases that preceded *TRAC*, the D.C. Circuit identified "hexagonal contours of a standard" for assessing agency delay. *TRAC*, 750 F.2d at 80. The D.C. Circuit often describes these "hexagonal contours" as follows:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Action on Smoking and Health ("ASH") v. OSHA, 100 F.3d 991, 994 n.1 (D.C. Cir. 1996) (quoting *TRAC*, 750 F.2d at 80).

The court has often identified—as the Trust cites with great emphasis—a baseline assumption that matters "will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade." *TRAC*, 750 F.2d at 80 (quoting *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)). However, the D.C. Circuit has made clear that it has "*no per se rule as to how long is too long*" for agency action, because "unreasonable delay"

determinations must be based on the totality of the case-specific factors.[2] *International Chem. Workers*, 958 F.2d at 149 (emphasis added). *See also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("the issue of whether delay is unreasonable necessarily turns on the facts of each particular case"). "We did not . . . intend to create a per se rule limiting agency action to nine years . . . ." *Cutler*, 818 F.2d at 897 n.156.

For example, in a complex rulemaking regarding occupational exposures to radon, the D.C. Circuit found no unreasonable delay in an agency's projected completion of the rulemaking seven years after its start—even though "human life and health [were] at stake." *Oil, Chem. and Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985). Therefore, in the absence of a detailed understanding of the precise facts behind each case, the Trust's simple recitation of some of the time periods which the D.C. Circuit has found in various cases to constitute "unreasonable delay" provides very little guidance for assessing FAA's and NPS's delay. Trust Pet. at 15.

B. The Trust Failed to Make a Compelling Case to the D.C. Circuit for Judicial Intervention in Ongoing Rulemakings

It is incumbent on petitioners in an agency review matter to develop the bases for the relief they seek. Nevertheless, the Trust's briefs failed to demonstrate to the D.C. Circuit that delays by FAA and NPS were unreasonable enough to justify judicial intervention.

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[2] The oft-cited "reasonable time" dicta came specifically from the telecommunications ratemaking context. *TRAC*, 750 F.2d at 80; *MCI*, 637 F.2d at 340. The different statutes, interests and issues involved in ratemaking versus non-ratemaking matters suggest that caution is necessary before applying too much weight to the dicta outside of the ratemaking context.

The Trust's principal brief to the D.C. Circuit neither mentioned nor analyzed the *TRAC* factors. Brief for Petitioners Grand Canyon Trust, *et al.*, at 16-17, *Air Tour Coalition*, 154 F.3d 455. Instead, its discussion in favor of judicial intervention was compressed into a page and one-half. *Id.* Almost a page of that discussion consisted of a detailed description of the substantive regulatory elements the Trust wanted the D.C. Circuit to order FAA and NPS to implement. *Id.* The whole of the Trust's legal argument in the principal brief supporting its Section 706(1) position was as follows:

> Indeed, the need for a Court order requiring prompt agency compliance with the statute is compelling. While the agencies have engaged in a decade of unauthorized delay, natural quiet at the Park has steadily deteriorated and the number of overflights has tripled. The Court should not permit another year to go by while one of the Nation's greatest natural treasures remains unrestored for enjoyment by the American people in the way Congress intended. This is particularly so since there are obvious, easy remedies available to achieve a significant amount of the return to natural quiet Congress ordered, *e.g.*, an expedited conversion to quiet aircraft, and immediately establishing flight-free zones sufficiently large that 50% of the Park is noise free.

Id. at 16. The Trust's reply brief added nothing to the "unreasonable delay" argument. Final Reply Brief for Petitioners Grand Canyon Trust, *et al.*, *Air Tour Coalition*, 154 F.3d 455.

Given D.C. Circuit precedent that judicial intervention during the course of ongoing agency rulemaking is reserved for "extraordinary circumstances" based on the six *TRAC* factors, *e.g.*, *International Chem. Workers,*

958 F.2d at 1149, the Trust's argument provided the D.C. Circuit little to work with as a basis for finding the agencies' schedule unreasonable.

C. The D.C. Circuit Properly Applied the Facts of This Case to Well-Settled Precedent to Dismiss the Trust's Petition for Review

Despite the Trust's lack of analysis, the D.C. Circuit carefully reviewed its "unreasonable delay" argument based on the principles of *TRAC* and its progeny. The D.C. Circuit applied *TRAC's* reasoning to the delay identified by the Trust to conclude that the Trust had not demonstrated that FAA's and NPS's delay crossed the line into unreasonableness. The court determined that the large potential for unintended consequences—including safety risks to air-tour passengers—from an order requiring expedited development of regulations outweighed any factors suggesting the unreasonableness of FAA and NPS delay. *Air Tour Coalition*, 154 F.3d at 476-77, Trust Pet. at 35a-39a.

"[W]e are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case." *Id. at* 476, Trust Pet. at 35a. *See also Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) ("OSHA not only possesses enormous technical expertise we lack, but must juggle competing rulemaking demands on its limited scientific and legal staff.").

1. *The D.C. Circuit Carefully Considered the Amount of Time FAA and NPS Are Taking to Develop Regulations*

As part of its assessment of the first two *TRAC* factors (the "rule of reason" for agency delay and guidance from the statute at issue), the court acknowlegded that

FAA and NPS have been slow in developing a set of Grand Canyon overflight regulations. However, the court correctly observed that the Overflights Act contains no mandate regarding precisely when the "substantial restoration of the natural quiet" contemplated by the Act must be achieved. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a.

"Indeed, the provision [in the Overflights Act] for a report [to Congress], which was to discuss whether the plan had succeeded and suggest revisions, makes clear Congress contemplated that the agencies' first plan [from 1988] might not succeed and might have to be revised—as the agencies have done in the regulatory plan at issue here." *Id.* Further, the Overflights Act required that progress on noise objectives not come at the expense of aviation safety and contemplated that tours would continue to provide visitors an opportunity to experience the Grand Canyon from the air. *Id.* at 460, 475, Trust Pet. at 4a, 34a. These statutory imperatives increased the complexity of rulemaking and the time necessary to complete it.

The Court also properly distinguished between two separate conceptual issues that the Trust conflates in its argument that a 21-year delay is at issue: (1) how long it takes for the agencies to conclude the rulemaking process to issue a set of overflight regulations; and (2) how long the regulations will take to attain fully the Overflights Act goals. *Id.* at 477, Trust Pet. at 37a. Only the first question—the time it takes to develop regulations—is covered by the "unreasonable delay" test. The second question is substantive: whether the regulations an agency or agencies ultimately promulgate reasonably implement the underlying statute or are instead arbitrary and capricious.

The agencies have been working four and a half years since NPS reported to Congress that the original 1988 regulations had not been sufficient to substantially restore natural quiet. *Id.* at 461-62, Trust Pet. at 5a-6a. While certainly a considerable period of time, it is well within the envelope of D.C. Circuit precedent regarding actions not constituting unreasonable delay. *E.g., Zegeer,* 768 F.2d at 1488 (delay of seven years in promulgating highly complex rule was not unreasonable, even though human lives and health were at stake). Because the delay analyzed in the cases cited by the Trust to establish a range for reasonable delay did not include the time after promulgation necessary to attain the substantive goal, the Trust's comparison of those cases to the 21-year period in this case is spurious. Trust Pet. at 15.

2. *The D.C. Circuit Addressed the Nature of the Interests Affected by Any Delay*

In addition to the number of years the agencies have been working on the overflights issue, the court also considered the types and extent of the interests that were prejudiced by any delay. *See TRAC,* 750 F.2d at 80 (courts should consider nature of interests involved). The court noted that this was not the sort of situation in which federal agencies have done nothing to address the issue in front of them. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a. The agencies have promulgated two rules, the rule to satisfy the immediate requirements of the Overflights Act in 1988 and the rule under review, that together have significantly curtailed noise in the Grand Canyon, even if not to the level the Trust seeks. *Id.* FAA and NPS have committed to promulgating the additional rules necessary to attain their definition of a "substantial restoration of the natural quiet" under the Overflights Act. *Id.* at 478, Trust Pet. at 39a.

Further, the court's opinion correctly observed that "there are a number of back-country areas of the Park that experienced almost a complete absence of aircraft sound even under the previous rule." *Id.* at 474 n.17, Trust Pet. at 31a n.17. Thus, the Trust's members can go places in the Grand Canyon to experience the natural quiet they seek, because the FAA's rules to date have already achieved much of the substantial restoration of the natural quiet. The 1997 FAA rule that was under review by the court will make *87 percent* of the Grand Canyon completely free of flights. *Id.* at 476, Trust Pet. at 35a. It is often the last few percent of a problem that are the most difficult to solve.

Thus, the nature of the interests at stake in this case contrast starkly with other contexts the D.C. Circuit has addressed, where human lives and businesses were literally in the balance pending a timely decision. *E.g., Brock,* 823 F.2d at 628 ("lives [are] hanging in the balance"); *Zegeer,* 768 F.2d at 1488 ("human life and health are at stake"). Indeed, the only human lives at stake in this rulemaking are passengers and pilots who may be imperiled by hasty action to reconfigure airspace in the Grand Canyon region. *See, e.g.,* 62 Fed. Reg. 26,902-26,904 (May 15, 1997) (closure of some current aircraft routes in the Grand Canyon could "lead to a mid-air collision"). This is not the type of case where an agency effectively loses the ability to regulate by waiting too long to act. *See, e.g., In re Center for Auto Safety,* 793 F.2d 1346, 1353-54 (D.C. Cir. 1986) (repeated failure to promulgate annual regulations with sufficient time to allow industry compliance undermined ability to regulate at all). The transient nature of noise and quiet mean that aircraft noise causes no permanent or cumulative effects in the Grand Canyon.

Another relevant consideration in the court's assessment of the interests at stake was the fact that the Trust's 1997 petition for review was the first petition complaining about the lack of agency action addressing Grand Canyon overflights. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a. *See also Washington Legal Found. v. Alexander,* 984 F.2d 483, 488 (D.C. Cir. 1993) (considering non-existence of prior lawsuits). While the court noted that this did not estop the Trust from filing suit, it did observe that "this is not a case where an agency has been contumacious in ignoring court directions to expedite decision-making." *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a-38a. Further, the fact that it took until 1997 for the Trust or other parties to complain about alleged delay suggests that the harm from any such delay was not particularly great.

3. *The D.C. Circuit Correctly Determined that the Disadvantages of Undue Haste Made FAA's and NPS's Rulemaking Schedule Reasonable*

Of perhaps the greatest importance to the court, however, was its assessment that it had a limited ability to expedite rulemaking judicially without causing collateral harm. "The issues involved here are complex. It is clear from the record that achieving substantial restoration will require a multitude of agency actions, including the entry into service of quieter aircraft. Nothing in the Trust's submissions demonstrate that this can be achieved 'immediately.'" *Air Tour Coalition,* 154 F.3d at 476, Trust Pet. at 38a.

> As a court we have no idea what the unintended consequences of immediately imposing an expansion of the flight free zones—which under the Final Rule already will cover 87% of the Park—might be. In addition to air safety concerns, it is possible that im-

> plementing such zones would do no more than shift the flights and their noise from the Park to the Hualapai [Indian] Reservation. Nor do we know what the consequences of ordering a cap on flights would be, or whether there might be other regulations that could better do the job. That, of course, is why such considerations normally are the province of expert agencies rather than the courts—and, as noted above, the FAA currently is considering such options. Moreover, although the Trust's frustration with the agencies' slow and faltering pace is understandable, we cannot say it has made out the case for the immediate imposition of so drastic a remedy.

Id. at 476, Trust Pet. at 35a-36a.

The court was aware through prior briefing that FAA had determined that flight-free zone changes could imperil flight safety and that the Hualapai Indian Tribe raised legal questions about shifting noise to their Reservation. Brief of Petitioners/Intervenors Clark County Dep't of Aviation and Las Vegas Convention and Visitors Auth. at 8, *Air Tour Coalition,* 154 F.3d 455; Principal Brief of Petitioner-Intervenor Hualapai Indian Tribe, *Air Tour Coalition,* 154 F.3d 455.[3] The court also recognized that Grand Canyon overflight regulation was originally designed to *promote* air-tour safety and that the Overflights Act explicitly provided that "natural quiet" restoration

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[3] Clark County called the court's attention to a recent FAA Federal Register notice in which FAA indicated its position that some flight-free zone expansions and route closures could cause "the potential for unsafe operating conditions" that "could lead to mid-air collision." 62 Fed. Reg. 26,902, 26,904 (May 15, 1997). The Hualapai Tribe argued that the effect of expanding flight-free zones in the Grand Canyon would be to shift noise to their Reservation, in violation of federal trust obligations to the Tribe and a number of procedural statutes designed to protect the Tribe. Hualapai Br. at 7-25.

was not to be achieved at the expense of safety. *Air Tour Coalition,* 154 F.3d at 460, Trust Pet. at 2a-4a.

These are precisely the sorts of assessments that D.C. Circuit precedent required the court to make. One of the essential ingredients in assessing the "reasonableness" of agency "delay" is to determine whether there is any reasonable way to reach closure on an issue (1) faster than the agency's current schedule and (2) without creating new problems. *See, e.g., In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988) ("The reasonableness of a delay depends in part on the potential impact of any attempt to accelerate the progress of the matter in question on other agency activities of equal or higher importance . . . ."); *In re United Steelworkers of America,* 783 F.2d 1117, 1120 (D.C. Cir. 1986) (complexity of the matter suggested that there was no value to be gained from moving on a faster schedule). If a court cannot identify a better procedural or substantive way to proceed, it is hard to characterize as unreasonable the time agencies are taking to address a problem.

Like physicians, courts' first principle should be to do no harm. "[J]udicial imposition of an overly hasty timetable . . . would ill serve the public interest. The rule ultimately promulgated by the agency, not to mention the agency's rationale for the rule, must be constructed carefully and thoroughly if the agency's action is to pass judicial scrutiny . . . ." *United Steelworkers,* 783 F.2d at 1120.

Contrary to the Trust's argument, the D.C. Circuit often cites the complexity and technical nature of a matter as a mitigating or exculpatory circumstance in cases of agency delay. *See, e.g., Sierra Club v. Thomas,* 828 F.2d 783, 798 (D.C. Cir. 1987) ("EPA must be afforded the

amount of time necessary to analyze such [complex technical] questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion."); *Zegeer*, 768 F.2d at 1488 ("due to complex scientific and technical issues, the difficulty and uncertainty inherent in the venture caution us against second-guessing MSHA's judgment" regarding agency's proposed rulemaking schedule).

The D.C. Circuit reasonably determined that the Trust had not shown that FAA's and NPS's rulemaking schedule was unreasonable, because the Trust had not demonstrated a better way to achieve the multiple ends of the Overflights Act.[4] When viewed in the context of D.C. Circuit precedent, the court's decision was an unremarkable application of well-established principles.

D. The D.C. Circuit Reasonably Dismissed the Trust's Petition Based on Agency Representations Regarding Rulemaking Intentions

The D.C. Circuit's decision to "take the government at its word" (Trust Pet. at 17) that it would meet the Overflights Act requirements through its ongoing rulemakings was also reasonable and consistent with precedent. In cases of alleged unreasonable delay, the D.C. Circuit regularly relies upon assurances by agencies regarding their intentions for future action. *See, e.g., ASH*, 100 F.3d at 994-95 (court relied on agency assurances re-

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[4] FAA indicated in its rulemaking that the "unambiguous intent of [the Overflights Act] with respect to the Grand Canyon was for the FAA to work with the NPS to devise a plan that would *safely* provide for a substantial restoration of natural quiet *while maintaining a viable tour industry*." 61 Fed. Reg. 69,302, 69,306 (Dec. 31, 1996) (emphasis added). Although the Trust argued that consideration of air-tour interests was invalid, the D.C. Circuit rejected that argument because the Overflights Act contemplated the continuation of Grand Canyon air tours. *Air Tour Coalition*, 154 F.3d at 475, Trust Pet. at 34a. The Trust does not address this issue in its writ petition to this Court.

garding progress); *United Steelworkers*, 783 F.2d at 1119-20 (court relied on schedule proffered by agency to reject mandamus relief); *TRAC*, 750 F.2d at 80 ("Because . . . FCC has assured us that it is moving expeditiously . . . we need not test the delay here against the above standard to determine if it is egregious enough to warrant mandamus.").

Contrary to the Trust's argument that the D.C. Circuit has given FAA and NPS an "open-ended" standard for unreasonable delay in this case, Trust Pet. at 17, the court clearly indicated that the agencies could not wait forever to promulgate rules. It thus indicated that the Trust could again petition the court for an order compelling agency action if the agencies take an unreasonably long time to complete rulemaking. *Air Tour Coalition*, 154 F.3d at 478, Trust Pet. at App. 39a.

The D.C. Circuit frequently invites petitioners to file supplemental petitions under Section 706(1) as a way of ensuring that agencies keep to a reasonable schedule. *E.g., Zegeer*, 768 F.2d at 1488 ("if MSHA should fail to act with appropriate diligence in following the estimates it has tendered to this court, petitioners may invoke our authority to direct MSHA to complete the rulemaking process with due dispatch"). This approach is sound. The D.C. Circuit should not have to act as the master scheduler for federal agencies. If agencies are on a reasonable course for completion of agency action, it would be inappropriate for courts to automatically assume that agencies will deviate from that course.

E. The D.C. Circuit's Denial of the Trust's Request to Retain Jurisdiction was Consistent with Precedent

The Trust also incorrectly claims that the D.C. Circuit broke with established practice by not retaining jurisdiction to ensure that FAA and NPS make progress towards

completing their rulemakings. Trust Pet. at 18. The D.C. Circuit often relinquishes jurisdiction in cases where agencies assert that they are on a reasonable path to complete agency action. *E.g.*, *ASH*, 100 F.3d at 994-95 ("we are not prepared to use ASH's mandamus petition as a basis for exercising judicial supervision"); *United Steelworkers*, 783 F.2d at 1120 ("We likewise fail to perceive any useful purpose in retaining jurisdiction or requiring periodic progress reports, as requested by petitioners."). As in the instant case, the Court has often relinquished jurisdiction with the understanding that "we leave the courthouse door open to petitioners to renew their petition for mandamus if [the agency] should 'fail to act with appropriate diligence in following the estimates it has tendered to this court.'" *United Steelworkers*, 783 F.2d at 1120 (quoting *Zegeer*, 768 F.2d at 1488).

The court appropriately assesses the necessity and propriety of retaining jurisdiction on a case-by-case basis. *See, e.g., id.* The D.C. Circuit has been more likely to retain jurisdiction where it believes there are indications of bad faith on the part of an agency. *See, e.g., Monroe Communications*, 840 F.2d at 947 (court retained jurisdiction solely because of unrebutted allegations of agency bad faith). The D.C. Circuit has suggested that it is less likely to retain jurisdiction if it does not appear that agency delay is a matter of bad faith or if the remaining issues before an agency are complicated. *E.g., id.* at 947 ("the unusual circumstance of an unrebutted allegation of bad faith leads us to retain jurisdiction"; "[r]etention might be impractical were many difficult and delicate issues still outstanding").

In the instant case, the D.C. Circuit did not face any evidence of bad faith on the part of FAA or NPS. At

the same time, the court recognized the complexity and difficulty of the issues that the agencies still face in developing overflight regulations that would meet natural quiet goals without creating unacceptable safety problems, unnecessary economic dislocation or impacts to Native American interests. In this context, the decision by the court to deny the Trust's request for retained jurisdiction is both reasonable and well within the range of precedent.

II. THIS CASE RAISES NO LEGAL ISSUES OF NATIONAL IMPORTANCE THAT WOULD JUSTIFY ISSUING A WRIT OF CERTIORARI

As discussed above, the decision in this case was a reasonable application of a particular set of facts to well-settled law regarding "unreasonable delay." The opinion neither created new legal principles nor called into question any old ones. The Trust identifies no conflicts that the *Air Tour Coalition* decision would create with other Circuits. Accordingly, there is no reason for the Court to burden its docket with the review of a straightforward application of facts to law.

A. The Trust Has Identified No Conflicts Between This Case and Precedent from Other Circuits

The Trust's argument is structured at points to suggest (without explicitly claiming) that the D.C. Circuit's decision in this case is at odds with a recent decision of the Tenth Circuit, *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1998). *E.g.*, Trust Petition at 12-13. However, *Forest Guardians* addressed only the "unlawfully withheld" prong of Section 706(1)[5] in its finding that courts must compel action if an agency misses a

[5] Section 706 provides in relevant part: "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C. § 706(1).

specific statutory deadline. *Forest Guardians,* 164 F.3d at 1272-73. The Tenth Circuit opined in dicta that, in "unreasonable delay" cases, Section 706(1) "leaves in the courts the discretion to decide whether agency delay is unreasonable." *Id.* at 1272.

Because the Trust correctly concedes that its argument arises out of the "unreasonable delay" provision of Section 706(1), Trust Pet. at i, there is no conflict between the instant case and *Forest Guardians.* Even if a split between the Circuits does exist regarding whether courts have any discretion not to compel agency action under the "unlawfully withheld" provision of Section 706(1), this case is not an appropriate vehicle to resolve such conflict.

B. The Trust's Proffered Grounds for the National Importance of This Case Are Unconvincing

The Trust strains credibility to identify two bases to support its request for this Court to exercise its jurisdiction. First, it argues that the D.C. Circuit's role as the tribunal "which has the primary, often the solitary, word on the question presented" elevates this case to national importance. Trust Pet. at 19. Second, the Trust argues that the fact that the Grand Canyon is a national treasure, coupled with Congress' specific desire to regulate air tours in the Grand Canyon, makes this a "more important case for deciding whether the Court of Appeals' interpretation of its obligations under the APA was correct." *Id.* at 20.

Neither argument would justify asserting jurisdiction in this case. The fact that this case came from the D.C. Circuit should make little difference to this Court's disposition of the writ petition. Contrary to the Trust's argument, the D.C. Circuit does not have the "primary" or "solitary" word regarding either aircraft noise or "un-

reasonable delay" under the APA. Petitions for review of FAA action or inaction—including actions under the Overflight Act—can be brought either in the D.C. Circuit or the geographic Circuit in which a petitioner resides. 49 U.S.C. § 46110(a).

Further, the D.C. Circuit has no monopoly on enforcement of Section 706(1). The other Circuits consider Section 706(1) issues regularly, even if not as frequently as the D.C. Circuit. *E.g., Independence Mining Co. v. Babbitt,* 105 F.3d 502 (9th Cir. 1996); *In re City of Virginia Beach,* 42 F.3d 881 (4th Cir. 1994). While the other Circuits undoubtedly consider D.C. Circuit decisions persuasive due to the D.C. Circuit's expertise in administrative matters, they are hardly bound by these decisions, as seen by the Tenth Circuit's analysis of the Section 706(1) "unlawfully withheld" provision in *Forest Guardians,* 164 F.3d at 1272-73.

The observation that the D.C. Circuit handles a disproportionate share of administrative review cases makes little difference because the decision under review breaks no new legal ground. As discussed above, the D.C. Circuit's decision in the instant matter was an application of particular facts to well-settled D.C. Circuit principles that the Trust does not challenge. In this context, the Trust's argument is no more than an exhortation that this Court should review *all* D.C. Circuit administrative decisions because of the importance of that court's administrative docket.

The Trust's last argument—that the Court should grant the petition for a writ of certiorari because this case is about the Grand Canyon—is even less persuasive. No one would disagree that the Grand Canyon is important. However, the Grand Canyon itself is not injured by air-

craft noise and is thus not really the issue in this case. Further, the fact that the Grand Canyon is a national treasure does not mean that the decision at issue raises any "important question *of federal law*" that should be addressed by this Court. Sup. Ct. R. 10(c) (emphasis added).

CONCLUSION

For the reasons outlined above, the Court should deny the Trust's petition for a writ of certiorari.

Respectfully submitted,

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(3)

No. 98-1417

In the Supreme Court of the United States

GRAND CANYON TRUST, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL AVIATION ADMINISTRATION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Aviation Administration unlawfully withheld or unreasonably delayed action required by the Act of August 18, 1987, Pub. L. No. 100-91, § 3, 101 Stat. 676 (codified at 16 U.S.C. 1a-1 note), when it promulgated a regulation that does not fully achieve until 2008 the statutory objective of substantially restoring the natural quiet in the Grand Canyon National Park.

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In the Supreme Court of the United States

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FEDERAL AVIATION ADMINISTRATION, ET AL.

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BRIEF FOR THE FEDERAL AVIATION ADMINISTRATION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 154 F.3d 455.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. A petition for rehearing was denied on November 4, 1998 (Pet. App. 41a). On January 22, 1999, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 4, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a Federal Aviation Administration (FAA) regulation implementing legislation to study and limit air traffic over the Grand Canyon National Park (Park). Act of Aug. 18, 1987 (Overflights Act or Act), Pub. L. No. 100-91, § 3, 101 Stat. 676 (codified at 16 U.S.C. 1a-1 note). 61 Fed. Reg. 69,302 (1996) (Final Rule or Rule); see also 62 Fed. Reg. 8862, 66,248 (1997) (delaying effective date for portions of the Rule). The Final Rule, which regulates air-tour operations over the Park in order to substantially restore natural quiet in the Park, includes a curfew, the designation of flight-free zones, a limit on the number of aircraft, and reporting requirements. The Rule is "part of an overall strategy to further reduce the impact of aircraft noise on the park environment and to assist the National Park Service [NPS] in achieving its statutory mandate * * * to provide for the substantial restoration of natural quiet and experience in Grand Canyon National Park." 61 Fed. Reg. at 69,302. The FAA is also engaged in finalizing new air-tour routes and further rulemaking to require the use of quiet aircraft technology for air tours over the Park.

The court of appeals denied petitions for review of the FAA's Final Rule filed by seven environmental organizations, which are now the petitioners before this Court, as well as by air-tour operators, local government entities, and an Indian Tribe whose reservation is adjacent to the Park. Petitioner environmental organizations seek this Court's review of the decision of the court of appeals that the FAA reasonably interpreted the Act and complied with applicable procedural requirements, and that judicial intervention to speed up the ongoing administrative process is not warranted.

1. In August 1987, Congress enacted the Overflights Act. Section 3(b)(1) of the Act required the Secretary of the Interior to submit, within 30 days, recommendations to the FAA "regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." 101 Stat. 676 (codified at 16 U.S.C. 1a-1 note). The Act required that the recommendations provide for "substantial restoration of the natural quiet and experience of the park," as well as "protection of public health and safety from adverse effects associated with aircraft overflight." *Ibid.* The Act further required the FAA, within 90 days, and after notice and comment, to "issue a final plan for the management of air traffic in the air space above the Grand Canyon." § 3(b)(2), 101 Stat. 676 (codified at 16 U.S.C. 1a-1 note). The FAA was required to implement the Secretary's recommendations without change unless the FAA determined that implementing the recommendations "would adversely affect aviation safety." § 3(b)(2), 101 Stat. 677 (codified at 16 U.S.C. 1a-1 note). Finally, the Act required that, within two years after the effective date of the plan required under Section 3(b)(2), the Secretary submit a report to Congress assessing the success of the initial efforts to attain substantial restoration of natural quiet and to discuss possible revisions to those efforts. § 3(b)(3), 101 Stat. 677 (codified at 16 U.S.C. 1a-1 note).

2. Within months after passage of the Overflights Act, the Secretary transmitted to the FAA a series of recommendations designed to provide for substantial restoration of the natural quiet in the Park, as required by the Act. 61 Fed. Reg. at 69,302. After reviewing the recommendations, the FAA, on June 2, 1988, issued revised procedures for operation of aircraft in the airspace above the Park. Special Federal Aviation

Regulation (SFAR) No. 50-2, 53 Fed. Reg. 20,264 (1988). SFAR 50-2 established minimum altitudes, four flight-free zones, and special routes for air-tour operators. SFAR 50-2 was to expire within four years, but the FAA later extended its operation. Pet. App. 4a-5a & n.1.

On September 12, 1994, the Secretary submitted to Congress the report (NPS Report or Report) required by Section 3(b)(3) of the Overflights Act. Pet. App. 5a & n.3. The Report included a definition of "substantial restoration of the natural quiet"—"that 50% or more of the park achieve 'natural quiet' (i.e., no aircraft audible) for 75-100 percent of the day." *Id.* at 6a (quoting NPS Report 182). Using that definition, the Report reviewed the effectiveness of SFAR 50-2 and offered a new set of recommendations for further regulatory action. The Report suggested modification of the existing air-tour route structure, expansion of flight-free zones, phased implementation of quieter aircraft technology, and imposition of a curfew on air-tour overflights. *Id.* at 6a-7a (citing NPS Report 199-200).

In anticipation of the NPS Report, the FAA, in conjunction with the Secretary, issued an advance notice of proposed rulemaking seeking comment on potential measures for reduction of aircraft noise in the Park. 59 Fed. Reg. 12,740 (1994). In July 1996, the FAA issued a notice of proposed rulemaking (NPRM) for revisions to SFAR 50-2. 61 Fed. Reg. at 40,120. The FAA received more than 14,000 comments. *Id.* at 69,305.

3. On December 31, 1996, the FAA issued the Final Rule. The Rule expands the area covered by flight limitations; caps the number of aircraft at the number operating in 1996; requires tour operators to submit three reports every year on their flights; imposes a curfew under which air tours may not operate between

6 p.m. and 8 a.m. from May through September and between 5 p.m. and 9 a.m. from October through April; establishes new minimum altitudes for flights in various areas of the park; and creates new flight-free zones. 61 Fed. Reg. at 69,330-69,332; Pet. App. 8a-9a.

The FAA determined that adoption of the Rule would nearly achieve substantial restoration of the natural quiet in the Park by 1997. The FAA also proposed two additional actions—to establish new, and to modify existing, flight routes and to require tour operators to use quieter aircraft. The FAA estimated that, if the quiet technology rule was adopted, 57.4% of the Park would experience natural quiet for at least 75% of each day by the year 2008. Pet. App. 6a, 8a, 9a.[1]

Based on initial surveys of air-tour operators as well as operation specifications, the FAA had determined that the Rule would permit approximately 136 aircraft to operate within the area covered by flight restrictions. Pet. App. 11a. After the Final Rule was issued, however, the FAA obtained additional data showing that it had underestimated the number of eligible aircraft. *Ibid.* The FAA therefore reevaluated the environmental analyses completed for the Final Rule and published its results in a notice of clarification and request for comments. 62 Fed. Reg. at 58,898. The FAA determined that, although the new information changed the environmental analyses, the changes did not warrant modification of the Final Rule. *Ibid.* Although the greater number of eligible aircraft would

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[1] The FAA subsequently withdrew the notice of availability of proposed routes that it issued simultaneously with the Final Rule. 63 Fed. Reg. 67,545 (1998). The FAA, in consultation with NPS, is considering alternatives to that proposal, *ibid.*, and anticipates issuing a new notice of availability in the near future.

cause the Final Rule to be less effective in achieving the substantial restoration of natural quiet over time, the Final Rule still represented progress toward that end, and the FAA concluded that the quiet-technology rulemaking and the finalization of the air-tour routes, when completed, would result in attainment of the statutory goal. *Id.* at 58,900, 58,905.

4. a. Four petitions for review of the Final Rule were filed in the court of appeals. Pet. App. 1a-2a. Three of the petitions essentially argued that the Rule does "too much, too soon." *Id.* at 2a.[2] By contrast, in the fourth petition for review, seven environmental organizations,[3] which are now the petitioners before this Court, contended that the Final Rule does "too little, too late." *Ibid.* Petitioners argued that the Rule's definition of "substantial restoration of the natural quiet" is not sufficiently stringent and that "a

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[2] The petitioners included (1) a group of air-tour operators who argued that the Final Rule is more stringent than Congress intended; (2) the Clark County Department of Aviation and the Las Vegas Convention and Visitors Authority, which focused on the possible elimination of a specific route as a result of the expansion of the flight-free zones; and (3) the Hualapai Tribe, which raised several procedural issues and also claimed that the FAA had violated its trust responsibility to the Tribe by failing to follow the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* The Tribe's reservation is adjacent to the Park, and it feared that the forced relocation of air-tour routes would cause more flights to pass over its land. See Pet. ii; Pet. App. 1a-2a, 12a, 25a, 28a.

[3] The organizations are the Grand Canyon Trust, the National Parks and Conservation Association, the Sierra Club, the Wilderness Society, the Friends of Grand Canyon, Grand Canyon River Guides, Inc., and the Northern Arizona Audubon Society. See Pet. ii.

rule that will not achieve substantial restoration until the year 2008 is inconsistent with the statutory goal." *Id.* at 30a.

b. The court of appeals denied the petitions for review. With regard to petitioners' contentions, the court upheld as reasonable the Final Rule's interpretation of "substantial restoration of the natural quiet" to mean that at least 50% of the Park experience natural quiet during at least 75% of the day, rejecting both the argument of industry organizations that the definition required too much quiet and petitioners' claim that it required too little. Pet. App. 16a-17a, 30a-34a. The court of appeals also rejected petitioners' claim that the Final Rule will achieve substantial restoration of the natural quiet "too late," and their related request that the court require the FAA to issue, within 60 days, regulations that will immediately achieve substantial restoration of the natural quiet in the Park; direct that the regulations establish flight-free zones ensuring that at least 50% of the Park is noise-free; and retain jurisdiction over the case to ensure compliance. *Id.* at 35a-39a.

In rejecting the latter claim and petitioners' request that the court order the FAA to take various measures, the court of appeals noted that several agency actions had been completed after the statutory deadlines for those actions had passed. Pet. App. 36a-37a. And the court stated that "[petitioners'] frustration with the agencies' slow and faltering pace is understandable." *Id.* at 36a. The court rejected, however, petitioners' argument that Congress intended that the natural quiet be fully restored in the Park within 120 days after passage of the Act. *Id.* at 37a. The court held that all Congress ordered within 120 days was the development of a plan, not full achievement of the statutory

objective. The fact that Congress required the Secretary of the Interior to submit a progress report two years after the Act's effective date showed that Congress understood the agencies' initial efforts might not be fully successful. *Ibid.* The court also rejected petitioners' contention that agency action had been unreasonably delayed, given the complexity of the issues and the fact that the FAA had proposed additional actions to achieve the statutory objective. Thus, the court concluded, it was neither contrary to the Act nor inherently unreasonable for the FAA to promulgate a rule that did not contemplate full achievement of the statutory objective until ten years after the rule was issued. *Id.* at 37a-39a.

ARGUMENT

This Court's review of the decision of the court of appeals is not warranted. The decision of the court of appeals is correct. It does not conflict with the decision of any other court of appeals or with any decision of this Court, and the issue presented arises under unique statutory provisions.

1. The court of appeals correctly rejected petitioners' contention (Pet. 12-19) that the FAA and the Department of the Interior have "unlawfully withheld or unreasonably delayed" (5 U.S.C. 706(1)) action required by the Overflights Act. As the court of appeals explained, although the Act "manifest[s] a congressional concern with expeditious agency action," it does not set a deadline for achievement of the goal of substantial restoration of the natural quiet in the Park. Pet. App. 36a-37a. And the agencies have not acted unreasonably because of the time it has taken to promulgate the rule that petitioners challenge here, or because the agencies' actions may not fully achieve the

Act's goal of substantial restoration of the natural quiet until the year 2008. See *id.* at 37a-39a.

a. Section 3 of the Act set deadlines for the promulgation of an initial plan to achieve that goal and submission of the NPS Report evaluating the success of the plan, see 101 Stat. 676 (codified at 16 U.S.C. 1a-1 note), but it set no deadline for achieving the goal itself. "Indeed, the provision for a report, which was to discuss whether the plan had succeeded and suggest revisions, makes clear Congress contemplated that the agencies' first plan might not succeed and might have to be revised—as the agencies have done in the regulatory plan at issue here." Pet. App. 37a.

The agencies were somewhat tardy in meeting the statutory deadlines, but petitioners never sought to compel the actions subject to the deadlines, and those actions were completed more than four years ago. There is accordingly no issue in this case concerning whether, or under what circumstances, a court might have compelled the FAA to take those specific actions. Instead, petitioners challenge FAA's new, more stringent approach, embodied in the Final Rule, which the FAA promulgated in response to the NPS Report. The Overflights Act did not expressly require the FAA to issue that new rule, and certainly did not require it to do so by any fixed date.

b. Although the issue is now essentially moot, we note that the FAA did not take unreasonably long to promulgate the Final Rule. Petitioners erroneously contend (Pet. 14) that the FAA "procrastinated for more than a decade in passing regulations designed to fulfill [the Act's] mandate." On the contrary, the FAA promulgated SFAR 50-2 in June 1988, less than a year after Congress passed the Overflights Act. See 53 Fed. Reg. at 20,264. As the court of appeals explained, that

regulation "went part of the way toward restoration." Pet. App. 37a. "As Congress directed, the government then evaluated progress under that regulation" (*ibid.*), and that evaluation revealed that aircraft noise would be greater than desired despite SFAR 50-2. In response, the FAA proposed and promulgated the Final Rule, and it proposed two additional actions that will provide for further aircraft noise reduction by establishing new aircraft routes and requiring the introduction of quiet aircraft technology.

Nothing in that course of action was unreasonable. Tellingly, petitioners never challenged SFAR 50-2 as failing to achieve the Act's goal, never sought to compel the NPS to issue its report evaluating the success of that regulation, and never sought to compel the FAA to amend SFAR 50-2 in response to the NPS Report. Indeed, "this is the first time any party has challenged the agency's delay in court." Pet. App. 37a.

c. Finally, it was reasonable for the agencies to provide for final achievement of the substantial restoration of the natural quiet in ten years from the promulgation of the Final Rule. As the court of appeals explained, the issues involved are complex, and achieving the statutory goal will require a multitude of agency actions. Pet. App. 38a. Deciding upon new air-tour routes, for example, requires the FAA to take into account air safety concerns, as well as the interests of persons such as members of the Hualapai Tribe who live near the Park and may be affected if overflights are rerouted to areas outside its boundaries. *Ibid.* The process of establishing the flight-free zones must also take into account the adverse consequences that would ensue if they "do no more than shift the flights and their noise from the Park to the Hualapai Reservation." *Id.* at 35a. Moreover, the quiet aircraft technology rule-

making also requires a careful balancing of the desire for reduced aircraft noise with aircraft safety and other concerns.

While the additional actions are being completed, the Final Rule will provide a significant reduction in noise levels. Because of the curfew, there are no air-tour flights over the Park during evening, night-time, and early morning hours. Pet. App. 8a. During the day, as well, natural quiet has been restored in much of the Park. The FAA concluded that the Final Rule will substantially restore natural quiet in 41.7% of the Park in 1997, even after considering the FAA's revised estimate of the number of aircraft operating in the Park. *Id.* at 11a. The area of the Park in which natural quiet has been substantially restored is expected to decrease to 34.2% in 2008, if aircraft operations continue to increase as expected. However, the reduced effectiveness of the Final Rule over time will be offset by the benefits from the quiet aircraft technology regulations and the new air-tour route structure. *Ibid.*

Given the ongoing agency process, congressional oversight of that process, the complexity of the regulatory issues, and the need to examine the safety impacts of any regulation of aircraft while in the air, the court of appeals correctly rejected petitioners' claim of agency action unlawfully withheld or unreasonably delayed.

2. Petitioners quote (Pet. 12-13) the Tenth Circuit's decision in *Forest Guardians* v. *Babbitt*, 164 F.3d 1261 (1998), amended on denial of reh'g, No. 97-2370, 1999 WL 236274 (Apr. 22, 1999), for the proposition that, because 5 U.S.C. 706(1) uses the word "shall," "Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." 164 F.3d at 1268-1269. *Forest Guardians*, however, involved a situation quite different from the

one here. In that case, the Secretary of the Interior listed a species of fish as endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, but failed to meet the statutory deadline for designating critical habitat for the species because Congress had imposed a moratorium on such designations and then greatly limited the availability of appropriated funds to the Fish and Wildlife Service for determining which species should be listed and what their critical habitats should be. 164 F.3d at 1268. Despite those appropriations restrictions, a panel of the Tenth Circuit concluded that Section 706(1) required the district court to issue an order directing the Secretary to comply with what the panel deemed to be an abiding nondiscretionary statutory duty. 164 F.3d at 1270.

Here, in contrast, the court of appeals correctly concluded that the Overflights Act sets no express deadline for the substantial restoration of the natural quiet and that the timetable contemplated by the FAA is not unreasonable. Because the court found that the FAA did not violate the Overflights Act, it did not address the issue in *Forest Guardians*—whether Section 706(1) requires a court to issue an injunction compelling compliance when an agency *has* been found to have violated a nondiscretionary statutory duty. Indeed, in *Forest Guardians*, the court recognized that, when an Act of Congress contains no precise deadline but instead requires an agency to act within an expeditious, prompt, or reasonable time, Section 706 "leaves in the courts the discretion to decide whether agency delay is unreasonable." 164 F.3d at 1272. The court of appeals properly exercised that discretion in this case when it concluded that the FAA has not unreasonably delayed agency action here.

Petitioners also claim (Pet. 15) that the courts of appeals have not permitted delays in agency action of the length that the court of appeals allowed here. Of course, deciding a claim of unreasonable delay requires detailed consideration of the circumstances of the rulemaking at issue, not just a comparison of the alleged delay with time periods that have been approved or disapproved in other cases. See *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*) (listing factors to consider in deciding unreasonable delay claim). But petitioners' argument suffers from an even more fundamental flaw: it rests upon an inapt comparison between this case, in which petitioners' fundamental complaint is that an agency has taken action but that action allegedly does not fully achieve the statutory goal with sufficient speed, with cases in which the gravamen of the complaint is the failure of an agency even to issue a rule or take any other action. *E.g.*, *Washington Legal Found.* v. *Alexander*, 984 F.2d 483, 488 (D.C. Cir. 1993) (alleged unreasonable delay in issuing a new policy or regulation in final form); *Community Nutrition Inst.* v. *Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985) (alleged unreasonable delay in holding a hearing), cert. denied, 475 U.S. 1123 (1986); *MCI Telecomms. Corp.* v. *FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (alleged delay in deciding whether to accept or reject tariff revis ions). Section 706(1) speaks only to the latter situation, by authorizing courts to compel "agency action"—generally meaning an agency rule, order, or license determination, see 5 U.S.C. 551(13)—that has been unlawfully withheld or unreasonably delayed. Section 706(1) does not speak to the content of a rule once it is issued.

Here, petitioners' claim was not that the agencies had failed to act, see Pet. 16 ("No one accused the [FAA] of 'doing nothing.'"), but that the Final Rule and the other actions that the FAA proposed will not require substantial restoration of the natural quiet in the Park as quickly as the Act allegedly demands, see *ibid.*; Pet. App. 35a. But, as we have said, taking administrative action is one thing, completely remedying the problem at which a statute is directed quite another.

None of the court of appeals cases that petitioners cite (Pet. 15) as inconsistent with the decision of the court of appeals involved the construction of a statute to determine whether an agency rule was unreasonable in specifying the time by which the statutory objective must be fully achieved. In any event, decisions construing statutes other than the Overflights Act could, at most, be minimally relevant to the question whether the court of appeals correctly construed that Act in this case. Thus, although petitioners' cases suggest that relief may be appropriate under Section 706(1) if an agency fails to promulgate any rule long after the deadline by which Congress directed it to act has passed, those cases do not establish any time period by which agencies must ensure that all the substantive goals of the statutes they enforce have been attained. Determining when a statutory objective must be accomplished requires consideration of the terms of the specific statute at issue, not Section 706(1). Here, the court of appeals correctly concluded that the FAA's timetable for achieving substantial restoration of the natural quiet in the Park, as required by the Overflights Act, was reasonable under that Act.

3. Finally, petitioners' contention (Pet. 19-20) that the legal question decided by the court of appeals is of national importance is unpersuasive. Petitioners first

argue that the case has special importance because it comes from the court of appeals for the District of Columbia Circuit. Petitioners contend (Pet. 19) that other courts, which look to the D.C. Circuit for guidance on questions of administrative law, will be led astray by the decision, which petitioners assert is an "unprecedented departure from [the] APA['s] mandate" that a court compel agency action unreasonably delayed (Pet. 16) and from past D.C. Circuit precedent (Pet. 13-14). As we have explained above, however, the court of appeals did not hold that it has discretion to decline to compel agency action unreasonably delayed; rather it held that the FAA and Department of the Interior have not delayed unreasonably. See pp. 11-12, *supra*. That holding did not depart from past precedent but applied the precedent that petitioners accuse the court of ignoring. Compare Pet. App. 36a n.21 (citing *TRAC*, 750 F.2d at 80) with Pet. 13-14 (citing same). Thus, there is no danger that other courts of appeals will be led astray by the decision.[4]

Petitioners finally argue (Pet. 19-20) that the case warrants this Court's review because it involves air-

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[4] The court of appeals' decision to "t[ake] the government at its word" (Pet. 12, 17, 19) that it will proceed expeditiously with the two proposed rulemakings is also fully consistent with precedent. See *Action on Smoking & Health* v. *Department of Labor*, 100 F.3d 991, 994-995 (D.C. Cir. 1996); *In re United Steelworkers of Am.*, 783 F.2d 1117, 1119-1120 (D.C. Cir. 1986) (*Steelworkers*); *Oil, Chem. & Atomic Workers Int'l Union* v. *Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (*Atomic Workers*); *TRAC*, 750 F.2d at 80. The court of appeals invited petitioners to ask the court for an order compelling agency action if the FAA takes an unreasonably long time to complete those rulemakings. That approach, which avoids placing the court as overseer of day-to-day agency action, is also consistent with precedent. See *Steelworkers*, 783 F.2d at 1120; *Atomic Workers*, 768 F.2d at 1488.

craft noise in the Grand Canyon National Park, "one of our Nation's most treasured sites." But petitioners do not contend that any delay in fully achieving the goal of the Overflights Act poses a danger to the Grand Canyon itself, and they exaggerate in claiming that the experience of the Park is "jeopardized by the near-constant noise of thousands of aircraft" (Pet. 20).[5] In any event, the fact that the case involves the Grand Canyon fails to establish that the court of appeals "has decided an important *question of federal law* that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c) (emphasis added).

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[5] Petitioners' characterization of the effect of aircraft noise in the Park ignores several important aspects of the Final Rule. First, because of the curfew, there are no air-tour flights over the Park during evening, night-time, and early morning hours. Pet. App. 8a. During the day, natural quiet has been restored in much of the Park—for example, 41.7% in 1997. *Id.* at 11a. Although short of the Act's ultimate goal, that is a significant improvement over conditions in 1994, when only 34% of the Park experienced natural quiet. *Id.* at 6a. Moreover, the fact that an area of the Park does not yet meet the natural quiet standard hardly means that visitors in that area are likely to be disturbed by noise from aircraft. The natural quiet standard is very demanding: an aircraft is considered audible if it causes a three decibel increase in the ambient noise level, the smallest change perceptible to the human ear. *Ibid.* The fact that natural quiet has not been restored in an area means that the area is expected to experience audible aircraft noise for more than 25% of the daylight hours, not that such noise is likely to disturb visitors' experience of the Park. According to data summarized in the NPS Report, only about 5% of Park visitors reported being annoyed by aircraft noise, *id.* at 15a, and those data were collected before the reduction in noise effected by the Final Rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1417

IN THE

Supreme Court of the United States

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' opposition briefs are notable for what they do *not* dispute. Respondents do not dispute that the 1987 Grand Canyon Overflights Act, in the words of the Court of Appeals, required "expeditious agency action." Pet. App. 36a. Respondents do not dispute that the Federal Aviation Administration ("FAA") has failed, nearly twelve years later, to promulgate regulations it believes will accomplish the mandate of the Overflights Act—the "substantial restoration of the natural quiet" to Grand Canyon National Park. Respondents do not dispute that Congress' mandate will not be achieved prior to 2008, twenty-one years after the Act's passage. Finally, respondents do not dispute that the predicted achievement of the statutory mandate rests only on long-promised but still undefined regulations to be promulgated by the FAA at some indeterminate time in the future.

Respondents nonetheless insist that the Court of Appeals acted in accordance with its obligation under the Administrative Procedure Act to "compel agency action * * * unreasonably delayed," 5 U.S.C. § 706(1), when it took the government "at its word," Pet. App. 39a, more than a decade after the fact, that it would eventually issue the required regulations that would restore natural quiet and that it would accomplish this goal more than twenty years after Congress' mandate issued. Respondents also insist that the question whether the lower courts are requiring agencies to follow congressional mandates on a timely basis is of little consequence. As set forth in the petition, and as further explained below, respondents are wrong. The Court of Appeals' interpretation of its obligations under Section 706(1) was indefensible, and the effects of its decision widespread. This Court's review is therefore necessary to clarify the circumstances in which Section 706(1) should be invoked to compel agency action that has been unreasonably delayed.

1. The central point of the FAA's opposition is its contention that the Court of Appeals acted properly because once an agency has taken *some* minimal action to comply with a congressional mandate, no matter how inadequate that action may be, a court can never find unreasonable delay under the APA. *See* FAA Opp. 16 ("taking administrative action is one thing, completely remedying the problem at which a statute is directed quite another"); *id.* (arguing that Section 706(1) does not apply here because the section "does not speak to the content of a rule once it is issued"). We agree that the Court of Appeals adopted this view, but that fact only underscores the need for this Court's review.

The FAA begins its opposition with a piecemeal recitation of the few steps it *has* taken over the years in response to the mandate of the Overflights Act. The opposition painstakingly recounts the promulgation of SFAR-50-2, a rule that all acknowledge was inadequate to satisfy the congressional mandate; the creation of the Park Service report, issued years after SFAR-50-2, confirming that the rule was not an adequate response to the Overflights Act; and the publication

of the Final Rule on December 31, 1996, just shy of ten years after the Overflights Act was passed. *See* FAA Opp. 3-7.

This long recitation of events only confirms the unreasonableness of both the agency's delay and the Court of Appeals' approval of it. As the FAA acknowledges, none of the actions it has taken have come close to achieving the statutory mandate Congress imposed in the Overflights Act: substantial restoration of natural quiet to Grand Canyon National Park. Indeed, the agency concedes that the 1996 Final Rule represents only "progress toward" the statutory mandate, FAA Opp. 6, and it argues only that undefined regulations to be created at some point in the future would make up the shortfall. Notably, the agency makes no suggestion that it has made any forward progress on promulgating a rule designed to achieve substantial restoration of natural quiet even by 2008, the self-imposed "deadline" accepted by the Court of Appeals. To the contrary, the FAA itself notes that it has withdrawn an earlier proposal designed to reach that goal, and has made no progress whatsoever in developing other regulations. *Id.*

As noted, however, the FAA argues that because it has taken *some* action to implement Congress's mandate, it is relieved from its obligation to actually fulfill that mandate within a reasonable time. *See* FAA Opp. 16; *supra* at 2. But as we pointed out in our petition, the APA requires an agency to "*conclude* a matter presented to it" within a "reasonable time," 5 U.S.C. § 555(b) (emphasis added), not just to make the occasional stab at achieving its mandate. Under the FAA's view, if it had issued a rule prohibiting visitors from yelling in the Grand Canyon, it would have taken sufficient "action" toward meeting the Congressional mandate to insulate it from a Section 706 petition. After all, while the prohibition would not have "completely remed[ied] the problem" at which the Overflights Act was directed, FAA Opp. 16, such a rule would have gone part of the way toward meeting the statutory goal. That view—which we agree was accepted by the Court of Appeals—is simply wrong and underscores the danger in allowing the Court of Appeals'

decision to stand unreviewed. An agency "cannot avoid application of the APA simply by refusing to act," *Southwest Williamson County Community Ass'n, Inc.* v. *Slater*, No. 97-6526, 1999 WL 247104 at *4 (6th Cir. Apr. 28, 1999), and it likewise cannot avoid application of the APA by interminably delaying actual compliance with a statutory mandate. *See Public Citizen Health Research Group* v. *Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987) (court of appeals "cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law").

The FAA also puts great emphasis on its contention that Congress "set deadlines for the promulgation of an initial plan,"[1] but did not set a "deadline for achieving the goal itself." FAA Opp. 10; *see also* id. at 11 (arguing that the Overflights Act did not require agency to issue a revised rule "by any fixed date"). Even if this were true—and it is not, *see* Pet. 5—the Government's distinction is irrelevant. The lack of a concrete statutory deadline means only that the agency's actions (or lack thereof) are reviewed under the "unreasonable delay" prong of Section 706, not under its "unlawfully withheld" prong. *See Forest Guardians* v. *Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998) ("the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action"), *mod. on other grounds*, 1999 WL 236274 (10th Cir. Apr. 22, 1999). And in any event, the Government has conceded (as it must) that Congress intended "expeditious" agency action in response to the Overflights Act, Pet. App. 36a, even absent a fixed statutory deadline for compliance.

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[1] The statute requires a "*final* plan," not an "initial plan," as the Government disingenuously represents. *See* National Parks Overflights Act § 3(a), 16 U.S.C. § 1a-1 note (ordering FAA Administrator, not later than 90 days after receiving recommendations from the Secretary of the Interior, to "prepare and issue a *final plan* for the management of air traffic in the air space above the Grand Canyon") (emphasis added).

In short, the view shared by both the FAA and the Court of Appeals—that an agency is immunized from the requirements of Section 706(1) so long as it issues *some* regulation, no matter how defective—virtually nullifies the statute and should not be allowed to stand unreviewed.

2. As we demonstrated in the petition, this Court's review is also warranted because of the extraordinary nature of the delay approved by the Court of Appeals, and because of the dangerous signal that approval sends to the FAA and other agencies continually subject to that court's review. The FAA, however, maintains that prior decisions finding agency delays of far fewer than twenty-one years to be unreasonable are not helpful guidance here, because of "the circumstances of the rulemaking at issue." FAA Opp. 15. Respondent Clark County similarly contends that because any examination of unreasonable delay is necessarily a case-by-case determination, earlier decisions do not inform the question in this case. *See* Clark County Opp. 3.

While each case of unreasonable agency delay must, of course, be evaluated on its own merits, prior decisions on the issue must still inform that inquiry. Before this case, the collective body of decisions from the courts of appeal addressing unreasonable agency delay adhered to some basic parameters—among them that delay of one or two years, "but *not* several years or a decade," would be tolerated. *MCI Telecomms. Corp.* v. *FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (emphasis added). Yet even today, more than twelve years after enactment of the Overflights Act, the FAA has *still* not issued regulations that it believes will accomplish Congress' objective, and the agency has no plans to restore the Park's natural quiet until yet another decade has passed. As we pointed out in the petition, no court of appeals has ever condoned agency delay remotely approaching the length of the delay here. *See Public Citizen* v. *Brock*, 823 F.2d at 629 (six-year delay in promulgating environmental regulation "treads at the very lip of the abyss of unreasonable delay"). Respondents simply have no answer to that argument.

Respondents also defend the agency's delay in this case, as did the Court of Appeals, by making vague statements about the "complexity of the regulatory issues" involved. FAA Opp. 13; Clark County Opp. 13. But as we have shown, while courts have made allowances for the "complexity" of agency proceedings before, they have *never* made two full decades' worth of allowance. *Compare Public Citizen* v. *Brock*, 823 F.2d at 629 ("complexity" of the questions involved and agency's limited resources warranted eight-month delay); *In re United Steelworkers of Am.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (14-month delay in completing final rule not "facially unreasonable," where agency was addressing "complex scientific and technical issues"). Nor do respondents answer our contention that Congress knew full well the issue here might be "complex," yet chose an expeditious timetable for addressing that issue.

3. Perhaps recognizing the weakness of its defense on the merits, the FAA attempts to blame petitioners for its own delay. The FAA argues throughout its opposition that because petitioners failed to come forward and complain prior to filing their petition for review, they should not be heard to complain now. *See* FAA Opp. 11 ("petitioners never sought to compel" earlier agency action); *id.* at 12 ("petitioners never challenged SFAR 50-2 * * * never sought to compel the NPS to issue its report * * * and never sought to compel the FAA to amend SFAR 50-2"). Clark County likewise argues that petitioners "took until 1997 * * * to complain about alleged delay," and that their failure to seek review earlier "suggests that the harm from any such delay was not particularly great." Clark County Opp. 11. Both respondents took their cue from the Court of Appeals itself, which suggested in passing that while the agency had been "undeniably slow" in proposing the Final Rule, "this [was] the first time any party has challenged the agency's delay in court." Pet. App. 37a.

Respondents' argument is particularly ill-considered, and the Court of Appeals' acceptance of it, if allowed to stand unreviewed, would set a dangerous precedent for future

cases. First of all, it took nearly a decade for the FAA to promulgate a final rule allowing petitioners to seek judicial review; had they attempted to complain earlier, the FAA surely would have moved to dismiss their challenge as being premature. But even more importantly, a holding that petitioners cannot receive redress now because they should have litigated the agency's unreasonable delay earlier creates incentives no court would welcome: parties will no longer be patient with agency delay, but will file petitions for review or for mandamus early and often, to stave off any charges of delay on their part. It is illogical (to say the least) to argue that a petition for review grounded on a statute prohibiting *unreasonable delay* may be denied if a party has waited too long to file the petition. As with its other determinations, the Court of Appeals' acceptance of this theory only demonstrates the need for this Court's review.

4. The FAA responds only in a footnote to our second major point: that this Court's review is required because the Court of Appeals abdicated its duty under the APA when it took the FAA at its "word" that the agency would eventually accomplish the task Congress charged it with in 1987, thereby allowing the agency to dictate the limits of its judicial review. The agency claims that the Court of Appeals' decision was "fully consistent with precedent." FAA Opp. 18 n.4. But the three cases it cites each involved a showing that *concrete* agency action would be taken within a strictly delimited timetable. *See Action on Smoking and Health* v. *Department of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996) (regulatory action would be accomplished in " 'fiscal year 1997' ") (citation omitted); *United Steelworkers*, 783 F.2d at 1120 (approving 14-month timetable for promulgating rule); *Oil, Chem. & Atomic Workers Int'l Union* v. *Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (approving two-year timetable to issue rulemaking). In contrast, when confronted here with a government attorney's unsupported representation that the agency, after failing for more than a *decade* to issue required regulations, would at some unspecified date issue a rule designed to accomplish the statutory goal in another *eleven years*, the Court of Appeals

simply took the government at its "word" and refused to retain jurisdiction over the case. That action was an egregious departure from prior decisions that warrants this Court's review.

5. In the petition, we showed that this case is of national importance because the FAA has failed to take required action to remedy what Congress determined more than a decade ago was a threat to the environment of what is perhaps the Nation's most treasured natural wonder. The FAA's response only demonstrates its persistent disregard of the priorities that Congress has set for it. The FAA suggests throughout its opposition that this Court should refrain from granting certiorari because, while it has not achieved Congress's 1987 mandate, the situation in the Grand Canyon is nevertheless tolerable. *See* FAA Opp. 13, 19 n.5. It maintains that the regulations currently in place set a "curfew" allowing air tours only during the day, and that only a small percentage of visitors actually report being annoyed by aircraft noise during their visit to the Canyon. *See id.* at 5, 13, 19 n.5. These meager excuses only underscore why the Court of Appeals should not have abdicated its responsibilities under the APA. It should be obvious that night air tours over the Grand Canyon would not be well-attended and that restricting tours to daylight hours is no restriction at all. And whether the level of noise at the Canyon is tolerable is not the agency's decision to make. The decision was *Congress*'—in fact, it was the FAA's refusal to act on its own that prompted the Overflights Act in the first place, *see* Pet. 4 n.5—and Congress told the FAA in no uncertain terms to promptly remedy the problem of aircraft noise in the Park. The agency has not done so more than twelve years later and the Court of Appeals' decision to look the other way plainly warrants this Court's intervention.

5. Finally, the FAA argues that this Court should refrain from granting certiorari in this case because "the issue presented arises under unique statutory provisions," FAA Opp. 9, and does not present " 'an important question of federal law that has not been, but should be, settled by this

Court.' " *Id.* 19 (quoting S. Ct. Rule 10(c)).[2] That is wrong. The issue presented in this petition—as evidenced by the question presented—is whether the Court of Appeals failed to fulfill its obligation under the Administrative Procedure Act to "compel agency action * * * unreasonably delayed." The APA is not an obscure provision. To the contrary, it applies to all agencies of the Federal government and the decisions of the D.C. Circuit construing the APA greatly influence both the actions of those agencies and the views of other circuit courts. This Court has never before considered the extent of the obligations of the lower courts under Section 706(1). It should take the opportunity now, grant the petition, and confirm that Section 706(1) is not merely aspirational, but requires courts to step in when agency action—as here—has been far too long delayed.

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[2] The FAA also argues that the Court of Appeals' decision "does not conflict with the decision of any other court of appeals or with any decision of this Court." FAA Opp. 9. As petitioners have observed, the District of Columbia Circuit is the court most likely to address whether an agency has unreasonably delayed action, as evidenced by the host of its prior decisions on the issue. *See* Pet. 19; *id.* at 13-16. As we also noted, the decision of the Court of Appeals in this case sharply conflicts with prior cases from that circuit. *Id.* at 15-16; *see also supra* at 5. And because the Court of Appeals' decision to "take the government at its word," Pet. App. 39a, improperly relieved the court of its statutory obligation to "compel agency action * * * unreasonably delayed," the decision also conflicts with the Tenth Circuit's opinion in *Forest Guardians*, 164 F.3d at 1268-69. *Forest Guardians* made clear that reviewing courts do not just have the "authority" to compel an agency to act, Pet. App. 35a, but *must* compel the agency to act when it has unreasonably delayed fulfilling its congressional mandate.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition should be granted.

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